TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1961

No. 468

STEVEN I. ENGEL, ET AL., PETITIONERS,

vs.

WILLIAM J. VITALE, JR., ET AL.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

PETITION FOR CERTIORARI FILED OCTOBER 3, 1961

CERTIORARI GRANTED DECEMBER 4, 1961

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New York Supreme Court

Appellate Division—Second Department

In the Matter of the Application

of

STEVEN I. ENGEL, DANIEL LICHTENSTEIN, MONROE LERNER, LENORE LYONS and LAWRENCE ROTH,
Petitioners-Appellants,

against

WILLIAM J. VITALE, JR., PHILIP J. FREED, MARY HARTE, ANNE PARCH and RICHARD SAUNDERS, constituting the Board of Education of Union Free School District Number Nine, New Hyde Park, New York,
Respondents-Respondents,

directing them to discontinue a certain school practice

and

HENRY HOLLENBERG, ROSE LEVINE, MARTIN ABRAMS, HELEN SWANSON, WALTER F. GIBB, JANE EHLEN, RALPH B. WEBB, VIRGINIA ZIMMERMAN, VIRGINIA DAVIS, VIOLET S. COX, EVELYN KOSTER, IRENE O'ROURKE, ROSEMARIE PETELENZ, DANIEL J. REEHIL, THOMAS DELANEY and EDWARD L. MACFARLANE,
Intervenor-Respondents-Respondents.

Statement Under Rule 234

This is an appeal by petitioners from an order in a proceeding under Article 78 of the Civil Practice Act dismissing the petition herein and denying petitioners' request for an order directing respondents, constituting the Board of Education of Union Free School District, Number 9, New

Hyde Park, New York, to discontinue or to cause to be discontinued, in the schools of the said school district the saying of a prayer designated by respondents as the "Regents Prayer", which prayer is now said daily in the said schools following the Salute to the Flag pursuant to a resolution passed by respondents.

The order denying the petition herein was made on October 5, 1959 by the Hon. Bernard S. Meyer, sitting in Special Term, Part I, of the Supreme
5 Court, Nassau County. It was entered on the same day in the office of the Clerk of Nassau County, and a copy thereof with notice of entry was served on petitioners on October 14, 1959.

The proceeding herein was commenced by service of a notice of motion and verified petition on January 22, 1959.

Respondents' affidavit in opposition with annexed exhibits and a verified answer, together with respondents' notice of motion to dismiss the petition, were served on petitioners on February
6 19, 1959.

Petitioners' reply to respondents' answer was served on all parties on March 2, 1959.

The notice of appeal from Judge Meyer's order was served on all parties on October 23, 1959, and filed on October 26, 1959.

The names of the original petitioners are Steven I. Engel, Daniel Lichtenstein, Monroe Lerner, Lenore Lyons and Lawrence Roth.

The names of the original respondents are William J. Vitale, Jr., Philip J. Freed, Mary Harte, Anne Birch and Richard Saunders, con-

stituting the Board of Education of Union Free School District, Number 9, New Hyde Park, New York.

By order made and entered on February 24, 1959, the intervenor-respondents were permitted to intervene, but their intervention was limited to the merits of the constitutional questions raised under the applicable provisions of the Constitution of the United States and the Constitution of the State of New York. The same order provided that the proposed answer of intervenor-respondents, which was part of their motion papers, be deemed served on petitioners simultaneously with the signing of the order.

The names of the intervenor-respondents are Henry Holleaberg, Rose Levine, Martin Abrams, Helen Swanson, Walter F. Gibb, Jane Ehlen, Ralph B. Webb, Virginia Zimmerman, Virginia Davis, Violet S. Cox, Evelyn Koster, Irene O'Rourke, Rosemarie Petelenz, Daniel J. Reehil, Thomas Delaney and Edward L. MacFarlane.

There has been no change in the parties or their attorneys since the commencement of this proceeding, except as hereinabove set forth.

10

Notice of Appeal

SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF NASSAU

In the Matter of the Application

of

STEVEN I. ENGEL, DANIEL LICHTENSTEIN, MONROE LERNER, LENORE LYONS and LAWRENCE ROTH,

11 Petitioners,

against

WILLIAM J. VITALE, JR., PHILIP J. FREED, MARY HARTE, ANNE BIRCH and RICHARD SAUNDERS, constituting the Board of Education of Union Free School District Number Nine, New Hyde Park, New York,

Respondents,

directing them to discontinue a certain school practice,

and

12 HENRY HOLLENBERG, ROSE LEVINE, MARTIN ABRAMS, HELEN SWANSON, WALTER F. GIBB, JANE EHLEN, RALPH B. WEBB, VIRGINIA ZIMMERMAN, VIRGINIA DAVIS, VIOLET S. COX, EVELYN KOSTER, IRENE O'ROURKE, ROSEMARIE PETELENZ, DANIEL J. REEHIL, THOMAS DELANEY and EDWARD L. MACFARLANE,

Intervenor-Respondents.

Sirs:

PLEASE TAKE NOTICE that the petitioners above-named hereby appeal to the Appellate Division of the Supreme Court, Second Department, from so much of the final order made in this proceeding

on the 5th day of October, 1959 by the Hon. Bernard S. Meyer, Justice of the Supreme Court, Nassau County, and entered on the same day in the Office of the Clerk of Nassau County, as denies the petition herein, denies petitioners' demand for a jury trial herein, and remands the subject matter of the petition herein to the respondent Board of Education for further proceedings not inconsistent with the opinion of the said Justice.

Dated: New York, October 23, 1959. 14

Yours, etc.

BUTLER, JABLOW & GELLER
Attorneys for Petitioners
Office & P. O. Address
400 Madison Avenue
New York 17, New York

To:

GUNN, NEIER & DAIKER
Attorneys for Respondents
49 Main Street
Port Washington, New York 15

HAHN, HAHN & FORD
Attorneys for Intervenor-Respondents
117 Pennsylvania Avenue
Brooklyn 7, New York

CLERK OF NASSAU COUNTY
Mineola, New York

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Order Appealed From

At a Special Term of the Supreme Court, Part I thereof, held in and for the County of Nassau at the County Court House, Old Country Road, Mineola, N. Y., on the 5th day of October, 1959.

Present:

HON. BERNARD S. MEYER,
Justice.

17

[SAME TITLE]

On reading and filing the Petition herein of Steven I. Engel, Daniel Lichtenstein, Monroe Lerner, Lenore Lyons and Lawrence Roth, verified January 4th, 1959, the answer of the Respondents, William J. Vitale, Jr., Philip J. Freed, Mary Harte, Anne Birch and Richard Saunders, constituting the Board of Education of Union Free School District Number Nine, New Hyde Park, New York, verified February 18th, 1959, and annexed exhibits, and, this Court having by Order dated February 24th, 1959, granted the application of Henry Hollenberg, Rose Levine, Martin Abrams, Helen Swanson, Walter F. Gibb, Jane Ehlen, Ralph B. Webb, Virginia Zimmerman, Virginia Davis, Violet S. Cox, Evelyn Koster, Irene O'Rourke, Rosemarie Petelenz, Daniel J. Rechil, Thomas Delaney and Edward L. MacFarlane to intervene in said proceeding on the issue involving the Constitutions of the United States and of the State of New York only, and on reading and filing the answer of said Intervenor-Respondents verified

18

Order Appealed From 19

February 17th, 1959, and the Board of Regents of the University of the State of New York having sought leave to serve and file a brief *amicus curiae* in said proceeding, and this Court having ordered that such leave be granted, and on reading and filing the reply of Petitioners herein, verified March 2nd, 1959, and said matter having come on to be heard on the 24th day of February 1959 pursuant to Notice of Motion dated January 9th, 1959, and an oral motion having been made by the Petitioners for the amendment of their Petition, and after hearing Butler, Jablow & Geller (William J. Butler, of Counsel), attorneys for Petitioners, in support of said Petition, and Gunn, Neier & Daiker (Bertram B. Daiker and Wilford E. Neier, of Counsel), attorneys for Respondents, in opposition thereto, and Hahn, Hahn & Ford (Porter R. Chandler and Thomas J. Ford, of Counsel), attorneys for Intervenor-Respondents, in opposition thereto, and the Respondents having moved by Notice of Motion dated February 18th, 1959, to dismiss said petition and the Petitioners having demanded a jury trial, and it appearing to this Court from the pleadings and the accompanying papers that no triable issue of material fact is raised thereby, and due deliberation having been had thereon, and upon reading and filing the memorandum opinion of this Court dated August 24th, 1959, and oral application having been made on behalf of all parties for permission to appeal, it is

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21

ORDERED that Paragraph 4 of the petition is deemed amended by inserting at the end thereof the words: "All of the schools referred to in paragraph '2' of this petition are within Union

Free School District Number Nine and under the jurisdiction and control of Respondents.", and the answers of Respondents and Intervenors are deemed answers to the petition as thus amended; and it is further

ORDERED that the motion to dismiss the Petition be and the same hereby is denied; and it is further

ORDERED that the affirmative defenses of the respondent Board to the Petition be and they hereby
23 are dismissed as insufficient in law; and it is further

ORDERED that the demand for jury trial be and the same hereby is denied; and it is further

ORDERED that the Petition be and the same hereby is as a matter of discretion denied; and it is further

ORDERED that the matter be and the same hereby is remanded to the respondent Board of Education for further proceedings not inconsistent with
24 the opinion; and it is further

ORDERED that the application made pursuant to the provisions of Section 1304 of the Civil Practice Act for permission to appeal be and it is hereby granted and the Court hereby directs that any party to this proceeding shall be entitled to appeal from this order.

Enter

B. S. M.,
J. S. C.

25

Petitioners' Notice of Motion

SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF NASSAU

In the Matter of the Application

of

STEVEN I. ENGEL, DANIEL LICHTENSTEIN, MONROE LERNER, LENORE LYONS and LAWRENCE ROTH, Petitioners, 26

against

WILLIAM J. VITALE, JR., PHILIP J. FREED, MARY HARTE, ANNE BIRCH and RICHARD SAUNDERS, constituting the Board of Education of Union Free School District Number Nine, New Hyde Park, New York,

Respondents,

directing them to discontinue a certain school practice.

Sirs:

PLEASE TAKE NOTICE, that upon the annexed petition of Steven I. Engel, Daniel Lichtenstein, Monroe Lerner, Lenore Lyons and Lawrence Roth, duly verified the 4th day of January, 1959, the undersigned will move this Court at a Special Term, Part I thereof to be held in and for the County of Nassau at the Courthouse at 33 Willis Avenue, Mineola, New York, on the 24th day of February, 1959 at 10:00 o'clock in the forenoon of that day, or as soon thereafter as counsel can be heard for an order directed against respondents William J. Vitale, Jr., Philip J. Freed, Mary Harte, Anne Birch and Richard Saunders, con- 27

stituting the Board of Education of Union Free School District Number Nine, New Hyde Park, New York, and commanding them to discontinue or cause to be discontinued in the schools of the said School District the saying of the prayer designated by respondents as the "Regents'" prayer, now said daily in the said schools following the Salute to the Flag pursuant to a resolution passed by respondents, and granting such other and further relief as may be just and proper in the premises.

Dated: New York, New York,
January 9, 1959.

Yours, etc.,

BUTLER, JABLOW & GELLER,
Attorneys for Petitioners,
Office & P. O. Address,
400 Madison Avenue,
Borough of Manhattan,
New York 17, New York.

To:
WILLIAM J. VITALE, JR., PHILIP J. FREED, MARY HARTE, ANNE BIRCH and RICHARD SAUNDERS, constituting the Board of Education of Union Free School District Number Nine of the State of New York,
New Hyde Park,
Long Island, New York.

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Petition, Read in Support of Petitioners' Motion

SUPREME COURT OF THE STATE OF NEW YORK

County of Nassau

[Same Title]

Petitioners, by their attorneys, Butler, Jablow & Geller, for their petition in this proceeding, allege as follows: 32

1. Each of the petitioners is a citizen of the United States of America, a resident of the State of New York in the County of Nassau and the owner of real property in the said County assessed by the tax authorities thereof in a sum exceeding $1,000, and each of the petitioners has within one year previous to the execution of this petition paid taxes upon such assessment.

2. Petitioner Steven I. Engel is the father of 33 Michael Engel, a child of seven years of age who resides with the said petitioner, and pursuant to the provisions of the Education Law attends regularly at the Searingtown School in Albertson, County of Nassau. Petitioner Daniel Lichtenstein is the father of Naomi Lichtenstein, David Lichtenstein, and Judy Lichtenstein, who are ten, twelve and fifteen years of age, respectively, and who reside with said petitioner, and pursuant to the provisions of the Education Law attend regularly at Searingtown School, Albertson, Herricks Junior High School, New Hyde Park, and Herricks

34 *Petition*

Senior High School, New Hyde Park, all in the County of Nassau, respectively. Petitoner Monroe Lerner is the father of Cynthia Lerner, who is seven years of age, and who resides with the said petitioner, and pursuant to the provisions of the Education Law attends regularly at Searingtown School, Albertson, County of Nassau. Petitioner Lenore Lyons is the mother of Jeanne Lyons, David Lyons and Wendy Lyons, who are nine, eleven and thirteen years of age, respectively, and who reside with the said petitioner, 35 and pursuant to the provisions of the Education Law attend regularly at Center Street School, Williston Park, Center Street School, Williston Park, and Herricks Junior High School, New Hyde Park, all in the County of Nassau, respectively. Petitioner Lawrence Roth is the father of Joseph Roth and Daniel Roth, who are ten and thirteen years of age, respectively, and who reside with the said petitioner, and pursuant to the provisions of the Education Law attend regularly at Searingtown School, Albertson, and Herricks Junior High School, New Hyde Park, both in the County 36 of Nassau, respectively.

3. Petitioner Steven I. Engel and his said child are members of the Jewish faith. Petitioner Daniel Lichtenstein and his said children are members of the Jewish faith. Petitioner Monroe Lerner and his said child are members of the Society for Ethical Culture. Petitioner Lenore Lyons and her said children are members of the Unitarian Church. Petitioner Lawrence Roth and his said children are non-believers.

4. Respondents constitute the Board of Education of Union Free School District Number Nine,

New Hyde Park, New York, and are charged with the performance of any and all duties imposed under the Education Law and by the regulations of the Commissioner of Education of the State of New York authorized by the Education Law

5. Petitioners are required by Section 3212 of the Education Law to cause their said minor children to attend regularly upon instruction during the entire term that the appropriate schools or classes are in session, and failure or refusal on the part of petitioners to cause their said minor children so to attend renders petitioners subject to punishment pursuant to the provisions of Section 3212 of the Education Law.

6. On information and belief, on the 8th day of July, 1958, at a special meeting of the Board of Education of the said Union Free School District Number Nine, at which respondents were present, respondents, by majority vote, passed a resolution moved by respondent Mary Harte and seconded by respondent Richard Saunders, that the so-called "Regents'" prayer be said daily in the schools of the said School District and that the Board of Education of the said School District direct Lester Peck, as District Principal of the said School District that the said prayer be instituted as a daily procedure following the Salute to the Flag.

7. The so-called "Regents'" prayer, to which the said resolution referred, is a prayer contained in a Statement of Belief adopted on November 30, 1951 at a meeting of the State Board of Regents of the State of New York, a copy of which Statement of Belief is attached to this petition

and made a part hereof as Exhibit "A". The said prayer reads in full as follows:

> "Almighty God, we acknowledge our dependence upon Thee, and we beg Thy blessings upon us, our parents, our teachers and our country."

8. On information and belief, respondents were not required by the said Statement of Belief of the State Board of Regents or by any subsequent order or act of the State Board of Regents or of the Commissioner of Education of the State of New York to institute the said prayer as a daily procedure in the schools of the said Union Free School District Number Nine, but their doing so was entirely voluntary on their part.

9. On information and belief, respondents have directed the said Lester Peck that the said prayer be instituted as a daily procedure following the Salute to the Flag in all of the schools of the said School District, and the said prayer is presently being said daily in all of the said schools as directed.

10. The manner in which the said prayer is said is as follows: Each morning at the commencement of each class in each school in the said Union Free School District Number Nine following the Salute to the Flag, the said prayer is said aloud. The prayer is led by the teacher or by a student selected by the teacher, with the other students joining therein. The prayer is said with hands clasped together in front of the body, fingers extended and pointed upwards in the manner of a supplicant. During the saying of the prayer, no student is permitted to leave the classroom.

11. The saying of the said prayer and the manner and setting in which it is said entails the use of the public school system of the said Union Free School District Number Nine and the time and efforts of the teachers and the staff of the schools in the said School District.

12. Both the saying of the said prayer and the manner and setting in which it is said constitute the teaching of religion and religious practices in a form, manner and setting which is contrary to the religion and religious practices of those of the petitioners who are believers and their said children, and is contrary to the religion and religious practices of a substantial number of other parents of children in the said Union Free School District Number Nine and their children, and, therefore, the saying of the said prayer and the manner and setting in which it is said is offensive to the said parents and children.

13. Both the saying of the said prayer and the manner and setting in which it is said constitute the teaching of religion and religious practices contrary to the beliefs concerning such matters held by the petitioner and his children who are non-believers and by other parents of children in the public schools of the said Union Free School District Number Nine and their said children who are non-believers, and the saying of the said prayer and the manner and setting in which it is said is, therefore, offensive to the said parents and children.

14. Both the saying of the said prayer and the manner and setting in which it is said have necessarily resulted in the exercise of coercion upon the children of petitioners and upon other students in the public schools of the said Union

Free School District Number Nine, to engage, against their will, in the saying of a religious prayer and or to do so in a manner and in a setting which is contrary to the beliefs of the said children and their parents, and is, therefore, offensive to them.

15. Both the saying of the said prayer and the manner and setting in which it is said are sectarian and denominational practices, and favor one or more religions and religious practices over others.

47 16. Both the saying of the said prayer and the manner and setting in which it is said favor the belief in religion over non-belief therein.

17. Both the saying of the said prayer and the manner and setting in which it is said have necessarily resulted in divisiveness among the students in the public schools of the said Union Free School District Number Nine and among their parents, because of the differences in the beliefs of the said students and their parents concerning religion and religious practices.

48 18. The saying of the said prayer and the manner and setting in which it is said violate the prohibition against laws respecting an establishment of religion contained in the First Amendment of the Constitution of the United States and made applicable to the State of New York by the Fourteenth Amendment of the said Constitution.

19. Both the saying of the said prayer and the manner and setting in which it is said also violate the prohibition against laws prohibiting the free exercise of religion contained in the First and Fourteenth Amendments of the Constitution of the United States.

20. Both the saying of the said prayer and the manner and setting in which it is said also violate the guaranty of the free exercise and enjoyment of religious profession and worship without discrimination or preference contained in Section 3 of Article 1 of the Constitution of the State of New York.

21. In causing the said prayer to be said in the public schools of Union Free School District Number Nine, as aforesaid, respondents have exceeded their powers and duties as a Board of Education as provided in Section 1709 of the Education Law.

22. If the Statement of Belief referred to in paragraph "7" of this petition is construed to authorize the action of respondents concerning the saying of the said prayer daily in the schools of Union Free School District Number Nine, the said Statement of Belief violates the First and Fourteenth Amendments of the Constitution of the United States and Article 1 of the Constitution of the State of New York.

23. On or about the 17th day of December, 1958, petitioners each duly demanded of respondents that they discontinue or cause to be discontinued in the schools of the said Union Free School District Number Nine, the saying of the said prayer, as aforesaid, but respondents have failed and refused to do so and their said failure and refusal is illegal and constitutes a dereliction of duty.

24. The discontinuance of the said prayer in the said schools is a non-discretionary duty imposed upon respondents by the Constitution of the United States and the Constitution and the laws of the State of New York.

52 *Petition*

25. Petitioners have no other adequate remedy at law or in equity to secure the redress sought herein.

WHEREFORE, petitioners respectfully request an order directed against respondents William J. Vitale, Jr., Philip J. Freed, Mary Harte, Anne Birch and Richard Saunders, constituting the Board of Education of Union Free School District Number Nine, New Hyde Park, New York, and commanding them to discontinue or cause to be
53 discontinued in the schools of the said School District the saying of the prayer designated by respondents as the "Regents'" prayer, now said daily in the said schools following the Salute to the Flag pursuant to a resolution passed by respondents, and granting such other and further relief as may be just and proper in the premises.

Dated: New York, New York,
January 4, 1959.

DANIEL LICHTENSTEIN
STEVEN I. ENGEL
MONROE LERNER
54 LENORE LYONS
LAWRENCE ROTH

(Verified by petitioners on Janaury 4, 1959.)

Exhibit A, Annexed to Petition

THE REGENTS STATEMENT ON MORAL AND SPIRITUAL TRAINING IN THE SCHOOLS

(Printed as Exhibit A, annexed to affidavit of William J. Vitale, Jr., read in opposition to motion; pp. 28-29, this record.)

Respondents' Answer, Read in Opposition to Motion

SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF NASSAU

[SAME TITLE]

Respondents answering the petition herein, by Gunn, Neier & Daiker, their attorneys, allege: 56

First: Deny each and every allegation contained in paragraphs "11", "12", "13", "14", "15", "16", "17", "18", "19", "20", "21", "22", "24", "25" of the petition herein.

Second: Deny any knowledge or information thereof sufficient to form a belief as to the allegations contained in paragraph "1" of the petition except admit that each of the petitioners is a resident of the State of New York, in the County of Nassau. 57

Third: Deny any knowledge or information thereof sufficient to form a belief as to the allegations contained in paragraph "3" of the petition herein.

Fourth: Deny each and every allegation contained in paragraph "5" of the petition except refers to Sec. 3212 of the Education Law for the text and legal effect thereof.

Fifth: The respondents make no specific denial to the allegations contained in paragraph "7" of

58 *Respondents' Answer*

the petition but beg the Court's indulgence in referring to a Supplemental Statement to petitioners' Exhibit "A" unanimously adopted by the State Board of Regents' on March 25, 1955, setting forth the Regents' recommendations for Programs in the schools stressing the Moral and Spiritual Heritage of America, which said Supplemental Statement in toto is attached as Exhibit "B" to the affidavit of respondent William J. Vitale hereto annexed and made a part hereof.

59 Sixth: Deny so much of paragraph "8" of the petition which alleges that the institution of the prayer as daily procedure was entirely voluntary on the part of the respondents and except as specifically denied admit same.

Seventh: Deny the allegations of paragraph "9" except admit that the prayer was directed to be instituted as a daily procedure.

Eighth: Deny the allegations contained in paragraph "10" except admit that the prayer is said
60 aloud each morning at the commencement of each class.

Ninth: Deny the allegations contained in paragraph "23" of the petition except admit that petitioners demanded the discontinuance of the saying of the said prayer, and that respondents have failed and refused to do so.

FOR A FIRST SEPARATE AND DISTINCT DEFENSE, RESPONDENTS FURTHER ALLEGE:

Tenth: That petition fails to state facts sufficient to constitute a cause of action for the relief sought herein.

61

FOR A SECOND SEPARATE AND DISTINCT DEFENSE, RESPONDENTS FURTHER ALLEGE:

Eleventh: That the relief herein sought, in the nature of a proceeding under Article 78 of the Civil Practice Act is not available to petitioners for the reason that the act of the respondents complained of is reviewable by an appeal to the Commissioner of Education and petitioners have failed to avail themselves of such remedy.

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FOR A THIRD SEPARATE AND DISTINCT DEFENSE, RESPONDENTS FURTHER ALLEGE:

Twelfth: That this proceeding has not been commenced within the time prescribed by law under Sec. 1286 of the Civil Practice Act in that the proceeding was commenced more than four months after the adoption by respondents of the act complained of on July 8, 1959.

FOR A FOURTH SEPARATE AND DISTINCT DEFENSE, RESPONDENTS FURTHER ALLEGE:

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Thirteenth: That a declaration of unconstitutionality of the act complained of in the petition is not available to petitioners in a proceeding commenced pursuant to Article 78 of the Civil Practice Act.

FOR A FIFTH SEPARATE AND DISTINCT DEFENSE, RESPONDENTS FURTHER ALLEGE:

Fourteenth: That the relief of injunction as prayed for in the petition is not available to petitioners in a proceeding under Article 78 of the Civil Practice Act.

64 *Respondents' Answer*

FOR A SIXTH SEPARATE AND DISTINCT DEFENSE, RESPONDENTS FURTHER ALLEGE:

Fifteenth: That neither the saying of the prayer nor the institution of the prayer as part of the school procedure as set forth in the petition constitute the establishment of a religion or deny the free exercise and enjoyment of religious worship within the spirit and letter of the meaning of the Constitution of the United States and the Constitution established by "The People of the
65 State of New York, grateful to Almighty God for our Freedom". (New York State Constitution, preamble.)

Sixteenth: The State of New York in furtherance of the public welfare through the exercise of reasonable judgment on the part of the New York State Legislature has prescribed by law that there should be fostered "in the children of the state, moral and intellectual qualities which are essential in preparing to meet the obligations of citizenship" (Education Law, Sec. 801) and has
66 directed school boards to comply therewith.

Seventeenth: The New York State Board of Regents' in furtherance of the legislative prescription, through the exercise of reasonable judgment, has set forth its recommendations as to how such moral and spiritual training in the schools shall be fostered. (Exhibits "A" and "B".)

Eighteenth: Petitioners enjoy no lawful authority to interfere with the saying of the prayer by the children of others under the color of judicial process or otherwise.

67

Nineteenth: The interference with freedom of religion, sought to be established by the petitioners, would be in violation of the Constitution of the United States and of the State of New York.

FOR A SEVENTH SEPARATE AND DISTINCT DEFENSE, RESPONDENTS FURTHER ALLEGE:

Twentieth: That petition is defective in that it fails to allege that the schools attended by petitioners' children as set forth in paragraph "2" are within Union Free School District #9 and under the jurisdiction and control of respondents.

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WHEREFORE, respondents demand that the application of petitioners be denied in all respects and that the petition be dismissed with costs.

GUNN, NEIER & DAIKER,
Attorneys for Respondents,
Office & P. O. Address,
49 Main Street,
Port Washington, New York,

69

(Verified by William J. Vitale, Jr., on February 18, 1959.)

70

Affidavit of William J. Vitale, Jr., Read in Opposition to Motion

SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF NASSAU

[SAME TITLE]

---

71 STATE OF NEW YORK)
COUNTY OF NASSAU) SS.:

WILLIAM J. VITALE, JR., being duly sworn, deposes and says:

1. I am the duly elected President of the Board of Education of Union Free School District Number Nine, sometimes called the Herricks School District, situated in the Town of North Hempstead, County of Nassau, State of New York and I am one of the respondents in this proceeding.

72 2. In the petition, it is alleged that the Board of Education of Herricks School District, on July 8, 1958, adopted a resolution providing for the saying of the so-called "Regents'" Prayer as part of the opening exercises in each class room within the District and that by so doing the School Board had exceeded its authority and that its refusal to discontinue the procedure "is illegal and constitutes a dereliction of duty" (Petition, paragraph "23"). This charge, if sustained, constitutes a serious offense warranting the removal of respondents by the State Education authorities.

3. The so-called Regents' Prayer is contained in a statement unanimously adopted by the Board of Regents on November 30, 1951 (Exhibit "A" hereto) and this was supplemented under date of March 25, 1955, by a recommendation, again unanimously adopted by the Regents, for school programs on America's Moral and Spiritual Heritage. (Exhibit "B")

4. As a member of said Board of Education, I was familiar with the recommendations of the Board of Regents regarding said prayer as contained in Exhibits "A" and "B" and, in addition, I was also aware of the opinion of the Commissioner of Education, who on June 10, 1957, in a case brought before him (Decision No. 6310, University of the State of New York, Allen, Commissioner), in which he said: 74

"While formal religion may not be injected into the public schools and while it is a matter for the church and the home, for the religious leaders and the parents of each child, I wish to emphasize that the school system throughout its entire curriculum should and does lay continuous stress upon the moral and spiritual values found in the Ten Commandments and in the other religious precepts which permeate the great declarations of our founding fathers, our State and Federal statutes and the vast body of classical literature taught in our public schools. 75

"The Regents Recommendations for School Programs on America's Moral and Spiritual Heritage," a statement unanimously adopted by the Regents on March 25, 1955, and issued to all schools, contains suggestions for laying such stress. Teaching children the basic values of

76 *Affidavit of William J. Vitale, Jr.*

America's moral and spiritual heritage has never been and must never be separated from the public schools."

5. With two such strong recommendations by the Board of Regents and the statement of the Chief Administrative Officer of the New York State Education Department before me, there was brought before the Herricks Board of Education the adoption of the prayer as part of the
77 daily procedure and on July 8, 1958, a resolution was duly adopted providing for the same. (Exhibit "C".)

6. Upon the adoption of the said resolution of July 8, 1958, regarding the prayer, the Board of Education directed that said prayer shall be said daily in all schools of the District and that no child was to be required or encouraged to join in said prayer against his or her wishes.

7. The School District consists of a Senior High School, a Junior High School and five ele-
78 mentary schools in which approximately 4294 children are pupils and in each of those schools, since their opening in the early part of September 1958, the procedure adopted by the Board of Education as aforesaid has been in force.

8. As of the date of this affidavit, no parent or child has complained to the Board of Education that the above procedure has not been scrupulously carried out and there has been brought to our attention only one instance in which any request has been received asking that a child be excused from joining in the prayer, which request has

been respected; nor has any child directly requested to be excused from joining in said prayer.

9. On the contrary the principals and teachers in the School District have been directed and are following the directions that under no circumstances shall a pupil in any way be made or encouraged to join in the prayer and no teacher has instructed the pupils how they are to hold their hands or otherwise conduct themselves during the saying of the prayer.

80

10. Neither the Board of Education nor the school administration has ever received any indication from either a parent or a child within the School District that any child has sought permission to leave any class room during the saying of said prayer.

11. As a member of the Board of Education of Herricks School District for some years and as a father I am fully conscious of the need for instilling in the youth of today some recognition of the moral and spiritual values which are part of the heritage of this country and of this State. The brief moment of prayer, by those who join in it at the opening of school each day, as prescribed in our School District, cannot help but remind those children, in the words of our State Constitution, that by acknowledging their dependence on God, they may thus "secure" the blessings of Freedom granted by Almighty God.

81

WHEREFORE, deponent prays that petitioners' application be denied.

WILLIAM J. VITALE, JR.

(Sworn to February 18, 1959.)

82 **Exhibit A, Annexed to Affidavit of William J. Vitale, Jr.**

THE UNIVERSITY OF THE STATE OF NEW YORK
THE STATE EDUCATION DEPARTMENT
Albany

THE REGENTS STATEMENT ON MORAL AND SPIRITUAL TRAINING IN THE SCHOOLS

BELIEF IN and dependence upon Almighty God was the very cornerstone upon which our Founding Fathers builded.

Our State Constitution opens with these solemn
83 words: "We, the People of the State of New York, grateful to Almighty God for our Freedom, in order to secure its blessings, do establish this Constitution."

We are convinced that this fundamental belief and dependence of the American—always a religious—people is the best security against the dangers of these difficult days. In our opinion, the securing of the peace and safety of our country and our State against such dangers points to the essentiality of teaching our children, as set forth in the Declaration of Independence, that Al-
84 mighty God is their Creator, and that by Him they have been endowed with their inalienable rights of life, liberty, and the pursuit of happiness.

We believe that at the commencement of each school day the act of allegiance to the Flag might well be joined with this act of reverence to God: "Almighty God, we acknowledge our dependence upon Thee, and we beg by Thy blessings upon us, our parents, our teachers and our Country."

We believe that the school day thus started might well include specific programs stressing the moral and spiritual heritage which is America's, the trust which our pioneering ancestors

placed in Almighty God, their gratitude to Him from Whom they freely and frequently acknowledged came their blessings and their freedom and their abiding belief in the free way of life and in the universal brotherhood of man based upon their acknowledgment of the fatherhood of their Creator, Almighty God, Whom they loved and reverenced in diverse ways.

We believe that thus constantly confronted with the basic truth of their existence and inspired by the example of their ancestors, our children will find all their studies brought into focus and accord, respect for lawful authority and obedience to law will be the natural concomitant of their growth, and each of them will be properly prepared to follow the faith of his or her father, as he or she receives the same at mother's knee, by father's side, and as such faith is expounded and strengthened for them by his or her religious leaders. 86

We believe that thus the school will fulfill its high function of supplementing the training of the home, ever intensifying in the child that love for God, for parents and for home which is the mark of true character training and the sure guarantee of a country's welfare. 87

We believe that such is the best way of insuring that this Government and our way of life shall not perish from the earth.

We believe that this Statement will be subscribed to by all men and women of good will, and we call upon all of them to aid in giving life to our program.

The foregoing statement of belief was unanimously adopted by the State Board of Regents at its regular meeting on November 30, 1951.

88

Exhibit B, Annexed to Affidavit of William J. Vitale, Jr.

The REGENTS' RECOMMENDATIONS for SCHOOL PROGRAMS on AMERICA'S MORAL & SPIRITUAL HERITAGE

THE REGENTS' RECOMMENDATIONS FOR SCHOOL PROGRAMS ON *AMERICA'S MORAL & SPIRITUAL HERITAGE*

89

Unanimously Adopted *by the* Regents
March 25, 1955

•

THE UNIVERSITY OF THE STATE OF NEW YORK
The State Education Department
Albany

1955

90

Exhibit B 91

THE UNIVERSITY OF THE STATE OF NEW YORK
Regents of the University

WILLIAM J. WALLIN, A.M., LL.D., *Chancellor Emeritus*, Yonkers

JOHN P. MYERS, A.B., D.Sc., LL.D., D.Eng., *Chancellor*, Plattsburgh

EDWARD R. EASTMAN, LL.D., Litt.D., *Vice Chancellor*, Ithaca

WELLES V. MOOT, A.B., LL.B., LL.D., Buffalo 92

MRS. CAROLINE WERNER GANNETT, L.H.D., LL.D., Rochester

ROGER W. STRAUS, Litt.B., LL.D., L.H.D., D.H.L., New York

DOMINICK F. MAURILLO, A.B., M.D., LL.D., Brooklyn

JOHN F. BROSNAN, A.M., LL.B., J.D., LL.D., D.C.L., New York

JACOB L. HOLTZMANN, LL.B., LL.D., D.C.L., New York 93

EDGAR W. COUPER, A.B., LL.D., Binghamton

ALEXANDER J. ALLAN, JR., LL.D., Litt.D., Troy

THAD L. COLLUM, C.E., Syracuse

GEORGE L. HUBBELL, JR., A.B., LL.B., New York

94 *Exhibit B*

AMERICA'S MORAL & SPIRITUAL HERITAGE

On November 30, 1951, the Regents issued their Statement on Moral and Spiritual Training in the Schools, which opened with these words: "Belief in and dependence upon Almighty God was the very cornerstone upon which our Founding Fathers builded."

In such Statement, the Regents expressed their convictions that such fundamental belief and de-
95 pendence is the best security against the dangers of these difficult days and the adoption of their recommendations the best way of insuring that this Government and our way of life shall not perish from the earth.

Such Statement contemplated the issuance of a Supplemental Statement setting forth the Regents' recommendations for programs in the schools stressing the Moral and Spiritual Heritage of America. This is the Supplemental Statement.

96

In putting such recommendations into effect teachers will be mindful always of the fundamental American doctrine of the separation of church and state, and careful at all times to avoid any and all sectarianism or religious instruction which advocates, teaches or prefers any religious creed. Formal religion is not to be injected into the public school. It is a matter for the church and the home, for the religious leaders and the parents of each child.

Exhibit B 97

FUNDAMENTAL BELIEFS

LIBERTY UNDER GOD • RESPECT FOR THE DIGNITY & RIGHTS OF EACH INDIVIDUAL • DEVOTION TO FREEDOM

The Brotherhood of Man
under the Fatherhood of God

Our Founding Fathers set forth in the Declaration of Independence, with unequaled clarity and simplicity, the fundamental moral and spiritual 98
ideals of this Nation:

> *We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness. That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed. . . .*

"All men are created equal" is the basic principle of the Brotherhood of Man, and "endowed 99
by their Creator with life, liberty and the pursuit of happiness" is the recognition of the Fatherhood of God, and that these most precious rights come from the Creator and not from the kings, princes or other men. The proposition that "government derives its just powers from the consent of the governed" is a recognition of the dignity, worth and sovereignty of each individual under God and of the concept of the individual as a sovereign citizen who, with his fellow citizens, is master of the state they have created and not its servant.

100 *Exhibit B*

The American people have always been a religious people, believing in God each in accordance with his own conscience. As our Supreme Court well stated, "We are a religious people whose institutions presuppose a Supreme Being."

The Constitution of the State of New York opens with these solemn words: "We, the People of the State of New York, grateful to Almighty God for our Freedom, in order to secure its blessings, do establish this Constitution."

101 The Great Seal of the United States has as its symbol for future generations an unfinished pyramid of thirteen steps, representing the thirteen colonies, which pyramid is placed under the eye of God, and the motto, "Annuit Coeptis," meaning "He Has Favored Our Undertaking." This motto is repeated on every dollar bill, and our common coins and stamps carry the words, "In God We Trust."

Our Presidents and other great leaders again and again have recalled to our people their dependence upon Almighty God and their obligations to their fellow men, and the necessity of

102 vigilantly protecting their liberty and their freedom. From the countless stream of quotations we cull the following:

At the Constitutional Convention in Philadelphia, Washington, as Chairman, set the spiritual tone for the sessions when he said: "Let us raise a standard to which the wise and honest can repair. The event is in the hand of God."

When the delegates at the Convention seemed hopelessly in disagreement, Benjamin Franklin, "imploring the assistance of Heaven," said, "I have lived, Sir, a long time, and the longer I live,

Exhibit B 103

the more convincing proofs I see of this truth—that God Governs in the affairs of men."

• • •

Washington, in taking his oath of office at his First Inaugural, said:

> *No people can be bound to acknowledge and adore the Invisible Hand which conducts the affairs of men more than those of the United States. Every step by which they have advanced to the character of an independent nation seems to have been distinguished by* 104
> *some token of providential agency; and in the important revolution just accomplished and in the system of their united government the tranquil deliberations and voluntary consent of so many distinct communities from which the event has resulted can not be compared with the means by which most governments have been established without some return of pious gratitude, along with an humble anticipation of the future blessings which the past seems to presage. . . .*

• • • 105

Again, in his Farewell Address, Washington puts his convictions into these enduring words: "Of all the dispositions and habits which lead to political prosperity, religion and morality are indispensable supports. . . . reason and experience both forbid us to expect that national morality can prevail in exclusion of religious principle."

• • •

Abraham Lincoln at Gettysburg said:

> *Four score and seven years ago our fathers brought forth on this continent, a new nation,*

106 *Exhibit B*

> *conceived in Liberty, and dedicated to the proposition that all men are created equal.*

He added that our soldiers fought and died there so "that this nation, under God, shall have a new birth of freedom—and that government of the people, by the people, for the people, shall not perish from the earth."

• • •

In another address these were his words:

107 > *Our reliance is in the love of liberty which God has planted in us. Our defense is in the spirit which prized liberty as the heritage of all men, in all lands everywhere. Destroy this spirit and you have planted the seeds of despotism at your own doors.*

• • •

And in one of his last public speeches he uttered the sublime thought:

108 > *With malice toward none, with charity for all, with firmness in the right as God gives us to see the right, let us strive on to finish the work we are in, to bind up the nation's wounds, . . . to do all which may achieve and cherish a just and lasting peace among ourselves and with all nations.*

• • •

In all these expressions Lincoln put into words the spiritual motivations for the sacrifices made not only by the heroes of Gettysburg and the other battles of the Civil War, but also of all Americans who have gone into battle, whether at Lexington, San Juan Hill, the Argonne Forest, Iwo Jima or Heartbreak Ridge.

• • •

Woodrow Wilson, in urging the American people to extend the principles of the Founders of this Republic into the realm of world leadership, said: "I summon all honest men, all patriotic, all forward-looking men to my side. God helping me, I will not fail them, if they will but counsel and sustain me!"

Finally, President Eisenhower brings our national moral and spiritual ideals down to date in these words: "Without God there could be no American form of government, nor an American way of life. . . . Thus the Founding Fathers saw 110
it; and thus, with God's help, it will continue to be. . . . The path we travel is narrow and long—beset with many dangers. Each day we must ask that Almighty God will set and keep His protecting hand over us so that we may pass on to those who come after us the heritage of a free people, secure in their God-given right and in full control of a government dedicated to the preservation of those rights."

Throughout our entire history as a Nation, these Fundamental Beliefs have been our moral and spiritual ideals, our guiding star and our compass in time of storm and trouble. They should 111
be a living part of the lives of all our children.

• • •

Devotion to Freedom

How well this is expressed in these challenging words of Thomas Jefferson: "I have sworn upon the alter of God, eternal hostility against every form of tyranny over the mind of man."

Our freedom of speech and worship and of the press, and to do all things which do not harm others, are highly important, but of even greater

importance is the desire and will of the people to have them and to preserve them. The only way for freedom-loving people to secure the "blessings of liberty to ourselves and our posterity" is eternal vigilance through actions that are in response to the Moral Law. In the words of the Chancellor of the Board of Regents, opening our 1953 Convocation, "Freedom is not free—it must constantly be defended and cared for lest we lose it. That is the price we pay for it. We must re-
113 interpret for our children the initiative, the courage and the faith of the Founding Fathers. We must root deeply in their hearts faith in the unimpeachable dignity of the individual and in the unquenchable spirit of free man."

Stressing Moral & Spiritual Values

We recommend:

First: That periods be set aside at frequent intervals during the school year which will be devoted to the intensive study of the foregoing fundamental and great American documents and
114 pronouncements. The same will give to the student an understanding and appreciation of his role as an individual endowed by his Creator with inalienable rights and as a member of a group similarly endowed; of respect for others, particularly parents and teachers, of devotion to freedom and of reverence for Almighty God. Thus, as we heretofore stated, "the school will fulfill its high function of supplementing the training of the home, ever intensifying in the child that love for God, for parents and for home which is the mark of true character training and the sure guarantee of a country's welfare."

• • •

Exhibit B

Second: The development of moral and spiritual values through all the activities and lessons of the school day and particularly by the good example of the school staff. For instance, sports and games may be used to build a sense of fair play, a willingness to lose a game rather than cheat, a desire to do to others as you would be done by and of striving to build a healthy mind and body. The study of science will develop honest dealing with facts, an open mind for new ideas and a keen alertness for the views and experiences of others, respect for truth and humility as one contemplates the vastness of space, the minuteness of the atom and the reign of law and order in the Universe. Biography will keep before pupils inspired examples of character, and encourage them with "the habitual vision of greatness." Friendship among pupils of interracial groups will constitute a strong bulwark against prejudice and intolerance.

Thus our children, inspired by the example of their ancestors, guided by the faith and love of their parents and encouraged by their spiritually sensitive teachers, will renew in their daily lives America's Moral and Spiritual Heritage:

LIBERTY UNDER GOD • RESPECT FOR THE DIGNITY & RIGHTS OF EACH INDIVIDUAL • DEVOTION TO FREEDOM

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Exhibit C, Annexed to Affidavit of William J. Vitale, Jr.

BOARD OF EDUCATION
UNION FREE SCHOOL DISTRICT No. 9
Town of North Hempstead
New Hyde Park, L. I., N. Y.

PIoneer 2-7800

CERTIFIED EXTRACT FROM MINUTES OF
BOARD OF EDUCATION, UNION FREE SCHOOL
119 DISTRICT No. NINE

of

Meeting of July 8, 1958.

• • •

"Mrs. Harte moved, seconded by Mr. Saunders, that the regents prayer be said daily in our schools. Motion carried by majority vote, Mr. Fried voted "nay".

"The Board of Education gave direction to the District Principal that this be instituted as a daily
120 procedure to follow the Salute to the flag."

• • •

I, FLORENCE ALNWICK, District Clerk of Union Free School District No. Nine, DO HEREBY CERTIFY that the foregoing is a true and correct copy of an extract from the minutes of a meeting of the Board of Education duly called and held on July eighth, nineteen hundred and fifty-eight, at which a quorum was present and acting throughout.

I DO HEREBY FURTHER CERTIFY that said resolution has not been rescinded or revoked.

Exhibit C 121

In witness whereof I have hereto set my hand under seal of District No. Nine, this date of February thirteenth, nineteen hundred and fifty-nine.

Florence Alnwick
FLORENCE ALNWICK,
District Clerk.

SEAL OF THE DISTRICT

Respondents' Notice of Motion 122

SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF NASSAU

[SAME TITLE]

SIRS:

PLEASE TAKE NOTICE that upon the notice of motion of petitioners herein dated January 9, 1959, the petition attached thereto, verified January 4, 1959, the answer of the respondents verified February 18, 1959, the affidavit of William J. Vitale, Jr., sworn to the 18th day of February 1959, a motion will be made at Special Term Part I of the Supreme Court of the County of Nassau, held at 33 Willis Avenue Mineola, New York, pursuant to Section 1293 of the Civil Practice Act, on the return date of this proceeding, to wit, on the 24th day of February 1959, at 10:00 o'clock in the forenoon of that day or as soon thereafter 123

Respondents' Notice of Motion

as counsel can be heard for an order dismissing the petition herein as a matter of law upon the following grounds:

(a) That the petition is insufficient in law and that it fails to state facts sufficient to constitute grounds for the relief sought therein, nor any relief on the merits;

(b) That the relief sought therein is not available to the petitioners as a matter of law;

(c) That this proceeding was not commenced within the time prescribed by law;

(d) That a constitutional question raised by the petitioners is improperly raised in this type of proceeding.

(e) That the relief sought by way of injunction is not available in this type of proceeding;

and for such other and further relief as to the Court may seem just and proper.

Dated: Port Washington, New York
February 18, 1959

Yours, etc.,

GUNN, NEIER & DAIKER,
Attorneys for Respondents,
49 Main Street,
Port Washington, New York

To:

BUTLER, JARLOW & GELLER,
Attorneys for Petitioners
400 Madison Avenue,
New York 17, N. Y.

Order Permitting Adding of Intervenors as Intervenors-Respondents

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At a Special Term, Part II, of the Supreme Court, State of New York, held in and for the County of Nassau, at 33 Willis Avenue, Mineola, County of Nassau, State of New York, on the 24th day of February, 1959.

Present:

HON. BERNARD S. MEYER
Justice.

128

[SAME TITLE]

The motion of Henry Hollenberg, Rose Levine, Martin Abrams, Helen Swanson, Walter F. Gibb, Jane Ehlen, Ralph B. Webb, Virginia Zimmerman, Virginia Davis, Violet S. Cox, Evelyn Koster, Irene O'Rourke, Rosemarie Petelenz, Daniel J. Reehil, Thomas Delaney, Edward L. MacFarlane for leave to intervene as parties respondents in this proceeding, having come on to be heard, pursuant to order to show cause, now, on reading and filing the order to show cause dated February 18, 1959, the joint and several affidavit of Henry Hollenberg, Rose Levine, Martin Abrams, Helen Swanson, Walter F. Gibb, Jane Ehlen, Ralph B. Webb, Virginia Zimmerman, Virginia Davis, Violet S. Cox, Evelyn Koster, Irene O'Rourke, Rosemarie Petelenz, Daniel J. Reehil, Thomas Delaney, Edward L. MacFarlane, verified the 17th day of February, 1959, the affidavit of Thomas J. Ford, Esq., in support of said motion, verified the 17th day of February, 1959, and proof of service of all thereof, and the affidavit of Bertram B. Daiker, verified

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130 *Order Permitting Adding of Intervenors as Intervenors-Respondents*

the 19th day of February, 1959, consenting to the granting of the motion of the proposed intervenors on the part of the respondent Board of Education and the petition of Steven I. Engel, Daniel Lichtenstein, Monroe Lerner, Lenore Lyons and Lawrence Roth, verified the 4th day of January, 1959 and the answer of the respondent Board of Education, verified the 18th day of February, 1959 and the affidavit of William J. Vitale, Jr. annexed to said answer, verified the 18th day of February,
131 1959 and upon the proposed answer of the proposed intervenors herein, verified the 17th day of February, 1959 and upon all the papers, pleadings and proceedings heretofore had herein, and after hearing Porter R. Chandler, Esq., of counsel, for Hahn, Hahn & Ford, Esqs., attorneys for the moving parties, in support of said motion and Wilford E. Neier, Esq., of counsel, for Gunn, Neier & Daiker, Esqs., attorneys for respondent Board of Education herein, consenting to the granting of said motion and William J. Butler, Esq., of counsel, for Butler, Jablow & Geller,
132 Esqs., attorneys for petitioners in opposition thereto, and due deliberation having been had thereon, and upon filing the opinion of the court, it is,

On motion of Hahn, Hahn & Ford, Esqs., attorneys for proposed intervenors,

ORDERED that this application be and the same hereby is granted in the discretion of the Court and Henry Hollenberg, Rose Levine, Martin Abrams, Helen Swanson, Walter F. Gibb, Jane Ehlen, Ralph B. Webb, Virginia Zimmerman, Virginia Davis, Violet S. Cox, Evelyn Koster, Irene O'Rourke, Rosemarie Petelenz, Daniel J. Reehil, Thomas Delaney, Edward L. MacFarlane

Order Permitting Adding of Intervenors as Intervenors-Respondents 133

are hereby added as intervenor-respondents to the above entitled proceeding on the following conditions:

1. That all of the intervenors be represented in this proceeding by one chief counsel who shall participate in the conduct of the proceeding on behalf of all intervenors.

2. That the intervenors' participation in the proceeding be limited to the merits of the constitutional questions raised under the applicable 134 **provisions of the United States Constitution and the Constitution of the State of New York, and**

3. That in the event petitioners be unsuccessful, no costs or disbursements be granted against them and in favor of intervenors.

Ordered that the caption to this proceeding be and the same hereby is amended to add intervenors as intervenor-respondents to said caption. Said intervenors as parties respondents shall be entitled to be heard in all subsequent proceedings that may be had hereon, and it is further 135

Ordered that the proposed answer of the said intervenors verified the 17th day of February 1959 annexed to and served with the moving papers herein be and the same hereby is deemed served on the petitioners herein simultaneously with the signing of this order, and it is further

Ordered that the oral application of the petitioners for an adjournment of the return day herein is denied.

Settle order on return day February 24, 1959.

Enter

B. S. M.,
J. S. C.

136 **Answer of Intervenor-Respondents**

SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF NASSAU

[SAME TITLE]

Respondents, Henry Hollenberg, Rose Levine, Martin Abrams, Helen Swanson, Walter F. Gibb,
137 Jane Ehlen, Ralph B. Webb, Virginia Zimmerman, Virginia Davis, Violet S. Cox, Evelyn Koster, Irene O'Rourke, Rosemarie Petelenz, Daniel J. Reehil, Thomas Delaney and Edward L. MacFarlane, for their answer to the petition herein by their attorneys, Hahn, Hahn & Ford, Esqs., 117 Pennsylvania Avenue, Brooklyn 7, New York, allege as follows:

First: Deny knowledge and information sufficient to form a belief as to each and every allegation contained in paragraphs of the petition
138 designated "1., 2., 3., 6., 8., 9."

Second: Deny each and every allegation of the paragraphs of the petition designated "5., 12., 13., 14., 15., 16., 17., 18., 19., 20., 21., 22., 23., 24., 25."

Third: Deny each and every allegation contained in paragraphs of the petition designated "10." except admit on information and belief that each morning at the commencement of the class in each school in the said Union Free School District Number Nine following the salute to the flag the said "Regents' " prayer is said aloud.

WHEREFORE, respondents pray that the proceeding be dismissed and that they be awarded their costs and disbursements.

HAHN, HAHN & FORD, Esqs.,
Attorneys for Respondents,
Office & P. O. Address,
117 Pennsylvania Avenue,
Brooklyn 7, New York.

(Verified by intervenor-respondents on February 17, 1959.)

Petitioners' Reply

SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF NASSAU

[SAME TITLE]

Petitioners, by their attorneys, Butler, Jablow & Geller, for their reply to Respondents' answer in this proceeding:

WITH RESPECT TO THE FIRST ALLEGED DEFENSE IN THE SAID ANSWER:

1. Deny each and every allegation contained in paragraph "Tenth" of the said answer.

142 *Petitioners' Reply*

WITH RESPECT TO THE SECOND ALLEGED DEFENSE IN THE SAID ANSWER:

2. Deny each and every allegation contained in paragraph "Eleventh" of the said answer, except admit that Petitioners have not taken an appeal to the Commissioner of Education in this matter, and allege that the failure to take such an appeal is not a bar to this proceeding.

WITH RESPECT TO THE THIRD ALLEGED DEFENSE IN
143 THE SAID ANSWER:

3. Deny each and every allegation contained in paragraph "Twelfth" of the said answer, and allege that this proceeding has been commenced within the time prescribed by Section 1286 of the Civil Practice Act in that the proceeding was commenced on or about January 22, 1959, within four months after the refusal by Respondents on or about January 6, 1959 of the demand made by Petitioners on or about December 15, 1958 that Respondents discontinue or cause to be discon-
144 tinued the saying of the Regents' Prayer in the public schools of Union Free School District No. 9.

WITH RESPECT TO THE FOURTH AND FIFTH ALLEGED DEFENSES IN THE SAID ANSWER:

4. Deny each and every allegation contained in paragraphs "Thirteenth" and "Fourteenth" of the said answer.

Petitioners' Reply

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WITH RESPECT TO THE SIXTH ALLEGED DEFENSE IN THE SAID ANSWER:

5. Deny each and every allegation contained in paragraphs "Fifteenth" to "Nineteenth", inclusive, of the said answer, except respectfully refer the Court to Section 801 of the Education Law and to Exhibits "A" and "B" annexed to the said answer for the text and legal defect thereof.

WITH RESPECT TO THE SEVENTH ALLEGED DEFENSE IN THE SAID ANSWER: 146

6. Deny each and every allegation contained in paragraph "Twentieth" of the said answer, and allege that the public schools attended by Petitioners' children as set forth in paragraph "2." of the petition herein are within Union Free School District No. 9 and under the jurisdiction and control of Respondents.

WHEREFORE, Petitioners respectfully repeat their request in the petition herein for an order 147
directed against Respondents, and commanding them to discontinue or cause to be discontinued the saying of the Regents' Prayer in public schools of Union Free School District No. 9.

BUTLER, JABLOW & GELLER,
Attorneys for Petitioners,
Office & P. O. Address,
400 Madison Avenue,
New York 17, N. Y.

(Verified by Lawrence Roth on March 2, 1959.)

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Opinion by Meyer, J.

SUPREME COURT

NASSAU COUNTY—SPECIAL TERM, PART I

(Cal. No. 1—2/24/59)

Dated August 24, 1959

[SAME TITLE]

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149 BUTLER, JABLOW & GELLER, ESQS.,
Attorneys for Petitioners,
400 Madison Avenue,
New York 17, New York.

CHARLES A. BRIND, ESQ.,
Attorney for Board of Regents of the University of the State of New York, *Amicus Curiae*,
State Education Building,
Albany, New York.

GUNN, NEIER & DAIKER, ESQS.,
Attorneys for Respondents,
49 Main Street,
150 Port Washington, New York.

HAHN, HAHN & FORD, ESQS.,
Attorneys for Intervenor-Respondents,
117 Pennsylvania Avenue,
Brooklyn 7, New York,
PORTER R. CHANDLER, ESQ.,
THOMAS J. FORD, ESQ.,
Of Counsel.

Does any provision of the United States or New York State Constitution invalidate a school board resolution directing that as a daily procedure, following the salute to the flag, the following

prayer be said in the schools of the district: "Almighty God, we acknowledge our dependence upon Thee, and we beg Thy blessings upon us, our parents, our teachers and our Country"?

The attempt to find a commonly acceptable prayer is not new. Madison recorded "a project of a prayer, by Governor Livingston, father of the present Judge, intended to comprehend and conciliate college students of every Christian denomination, by a form composed wholly of texts and phrases of Scripture";[1] and Benjamin 152

[1] Letter to Edward Everett, March 19, 1823, reprinted in BLAKELY, AMERICAN STATE PAPERS ON RELIGION (1943), 592. The Governor Livingston referred to was William Livingston, the first governor of New Jersey, who while he lived in New York had been a member of the Committee of Trustees for the Lottery Fund, from which Fund, King's College (now Columbia University) was to be supported. In a series of newspaper articles, Livingston assailed the proposed college as an institution of the established church and pressed for a college under civil direction. He formulated his own plan under which "no religious profession in particular be established" and which would have prohibited any by law relating to religion, except compulsion of church attendance on Sabbath. He 153 urged that "the whole College be every morning and evening convened to attend public prayer * * * and that such forms be prescribed and adhered to, as all Protestants can join in." When his opponents charged that no such prayer could be formulated, Livingston prepared and published in the *Independent Reflector* of Thursday, May 31, 1753, the prayer Madison mentions. It is reprinted in part in PRATT, ANNALS OF PUBLIC EDUCATION IN NEW YORK ... THE FOUNDING OF KING'S (AFTERWARDS COLUMBIA) COLLEGE (1873), 224-225. The history of the controversy is detailed in MAHONEY, THE RELATION OF THE STATE TO RELIGIOUS EDUCATION IN EARLY NEW YORK, 1633-1825 (1941), 74-76.

Franklin wrote his own more generalized version of the Lord's Prayer, with detailed explanation of the reasons for each change.[2] Nor is the problem of prayer in New York public schools novel. In a series of rulings beginning in 1837 and continuing until at least 1909, the Superintendent of Common Schools of the State of New York held that a "teacher might open his school with prayer, provided he did not encroach upon the hours allotted to instruction, and provided that the attendance of the scholars was not ex-
155 acted as a matter of school discipline."[3] The rational of the policy is most clearly stated by Superintendent Spencer, in a decision rendered May 13, 1839,[4] as follows:

> "Both parties have rights; the one to bring up their children in the practice of publicly thanking their Creator for his protection, and invoking His blessing; the other of declining in behalf of their children, the religious services of any person in whose creed they may not concur, or for other reasons
> 156 satisfactory to themselves. These rights are reciprocal, and should be protected equally; and neither should interfere with the other. Those who desire that their children should

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[2] Cousins, In God We Trust (1958), pp. 21-23.

[3] New York State, Education Department, Superintendent of Common Schools, Annual Report 1912-1913, Part 2, pp. 524-532. The quotation is from Orders and Decisions, 6:391, referred to at *ibid.*, p. 532. A decision by Superintendent Randall, dated October 27, 1853 in Matter of Quigley, not abstracted in the Annual Report, held that a teacher could not compel Catholic children to join in prayer or read the Bible.

[4] Orders and Decisions, 8:87, abstracted in *op. cit., supra*, n. 3, at p. 526.

engage in public prayer have no right to compel other children to unite in the exercise, against the wishes of their parents. Nor have those who object to this time, place or manner of praying, or to the person who conducts the exercises, a right to deprive the other class of the opportunity of habituating their children to what they conceive an imperious duty. Neither the common school system, nor any other social system, can be maintained, unless the conscientious views of all are equally respected. 158 The simple rule, so to exercise your own rights as not to infringe on those of others, will preserve equal justice among all, promote harmony, and insure success to our schools. In the present case, the Superintendent thinks the trustees had lawful right to permit the teacher to commence the business of the day by public prayer, with the children of such parents as desired it; and they were also right in directing that such exercises should not take place during school hours, nor form a part of school discipline. 159

"And the teacher should allow the children of all parents who do not desire them to engage in prayer to withdraw from the room, or to absent themselves from it. But if they come into the room before the usual school hours, and choose to remain there during prayer, they must preserve the order and decorum befitting such an occasion."

In 1951 this policy was altered when the Board of Regents adopted a statement of belief recommending the prayer quoted above with the suggestion that "at the commencement of each school day the act of allegiance to the Flag might well

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be joined with this act of reverence to God."[3] Respondent School Board having followed the Regents' recommendation and directed recital of the prayer, the question presented to this court is whether as a matter of power, rather than as a question of policy, it may legally do so? For the reasons hereafter set forth at length, it is concluded that the "establishment" clause of the Constitution does not prohibit the non-compulsory saying of the Regents' Prayer in the public schools, but that the "free exercise" clause
161 requires that respondent Board take affirmative steps to protect the rights of those who, for whatever reason, choose not to participate.

The case arises as an Article 78 proceeding, seeking an order in the nature of mandamus directing the respondent Board of Education of Union Free School District Number Nine, Town of North Hempstead to discontinue use of the prayer. The five petitioners are taxpayers within the district and parents of children in schools of the district. Permission to intervene was asked by sixteen taxpayer-parents who oppose the pe-
162 tition, and intervention was allowed pursuant to C.P.A., §1298, but limited in the Court's discretion to the merits of the constitutional questions under applicable provisions of the United States Constitution and the Constitution of the State of New York. The State Board of Regents did not seek to intervene but asked and without objection was granted leave to file a brief *amicus curiae*. The action of the Board which is questioned is

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[3] *The Regents Statement on Moral and Spiritual Training in the Schools*, adopted November 30, 1951. On March 25, 1955, this statement was supplemented by *The Regent's Recommendations for School Programs on America's Moral & Spiritual Heritage*.

the adoption on July 8, 1958 of a resolution "that the regents prayer be said daily in our schools" and the direction, at the same meeting, by the Board "to the District Principal that this 'be instituted as a daily procedure to follow the Salute to the flag". The respondent Board of Education answered and moved to dismiss on a number of procedural grounds.

THE PROCEDURAL QUESTIONS

First, it is claimed that since the matter "can 164
be adequately reviewed by an appeal to a court or to some other body or officer", to wit—the Commissioner of Education, pursuant to Education Law, §310, C.P.A., §1285(4) precludes consideration of the instant petition. That section, however, is not controlling in a proceeding in the nature of mandamus "to compel performance of a duty specifically enjoined by law",[6] nor even in what would normally be a discretionary matter if a constitutional issue is involved.[7] It is, there-

[6] Matter of Leonard v. Horton, 278 App. Div. 62.

[7] Matter of Ellis v. Dixon, 118 N. Y. S. 2d 815, n.o.r., 165
dismissed for failure to appeal to the Commissioner, an Article 78 proceeding seeking review of the School Board's refusal to permit use of the schoolhouse, normally a discretionary matter. The Appellate Division affirmed, 281 App. Div. 987 (lv. den. 306 N. Y. 981, cert. dism'd 349 U. S. 458) holding that "The proceeding was properly before the court" but that the facts alleged did not show a clear legal right in petitioners or a failure by respondents to perform a duty enjoined by law. The holding accords with the line of cases reviewed in BENJAMIN, ADMINISTRATIVE ADJUDICATION, Vol. IV, pp. 51-54, of which Matter of O'Connor v. Emerson, 196 App. Div. 807, aff'd w.o. 232 N. Y. 561 is illustrative, to the effect that the availability of review by the Commissioner does not bar Article 78 review of action involving an interpretation of a statute and which is in violation thereof.

fore, unnecessary to rule on petitioners' further contention that appeal to the Commissioner is not "adequate."[8]

The Board next points to the fact that its resolution was adopted July 8, 1958, more than four months before the commencement (January 22, 1959) of this proceeding, and says that the proceeding is, therefore, not timely brought. But since what is charged in the petition is a continuing failure to obey the requirements of the Federal and State constitutions, and the proceeding
167 was commenced within four months after the demand for discontinuance, it is within the time allowed by C.P.A., §1286.[9]

Third, the Board argues that a question of constitutionality must be raised in a plenary action rather than a special proceeding. This contention is based on the well-established rule that in a proceeding to review an application addressed to the discretion of an administrative body, petitioner is held to have conceded, for the purpose of the application, the constitutionality of the statute or ordinance under which the body acts.[10]
168 But the application here is one involving performance of a constitutional duty, and that ques-

[8] The argument that the finality of the Commissioner's determination prevents judicial determination of the constitutional question, thus making appeal to the Commissioner inadequate, is no longer valid in view of Matter of Ross v. Wilson, 308 N. Y. 605, and Matter of Ellis v. Allen, 4 App. Div. 2d 343, app. dism'd 4 N. Y. 2d 693, lv. den. 4 N. Y. 2d 674, permitting review, despite Education Law § 310, of a determination of the Commissioner involving a constitutional question.

[9] Matter of Cash v. Bates, 301 N. Y. 258.

[10] Matter of Diocese of Rochester v. Planning Board of Town of Brighton, 1 N. Y. 2d 508, 519, 520.

tion is properly raised in an Article 78 proceeding.[11]

Fourth, the Board objects that petitioners are, in effect, seeking an injunction, which relief is not available in this proceeding. Of course, as the language of Section 1284 ("duty specifically *enjoined* by law") and the name (mandamus) of the former procedure imply, Article 78 procedures encompass relief which might be ordered by a mandatory injunction. That fact alone will not put outside the scope of Article 78 proceedings an action, such as the present one, seeking to compel the Board to obey the command of specific constitutional provisions, and thus within the express language of §1284(3).[12] 170

Finally, it is claimed that the petition is defective and should be dismissed as a matter of law because it fails to allege (a) that the schools attended by petitioners' children are within the school district and under control of respondent Board, and (b) facts which establish that the Board failed to perform a duty enjoined by law. With respect to the alle[illegible]ation of control, petitioners sought at the hearing permission both to reply and to amend their petition and have filed a reply containing the allegation said to be 171

[11] People *ex rel.* Ferguson v. Vroman, 101 Misc. 233, aff'd 180 App. Div. 914, rev. o.g. 222 N. Y. 586; Matter of McCabe v. Voorhis, 243 N. Y. 401; CARMODY-WAIT, Vol. 22, p. 200.

[12] Lewis v. Board of Education, 258 N. Y. 117, 123; CARMODY-WAIT, Vol. 22, p. 187. Matter of Donegan v. Patterson, 4 Misc. 2d 81, cited by the Board, appears distinguishable since no statutory or other duty was referred to.

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missing. Since the petition does not *in haec verba* make the allegation, the Court in the exercise of the discretion with which it is clothed by C.P.A., § 1294, grants the request to amend in order to obviate any question on the point,[13] although the fact is one that will be judicially noticed[14] and, therefore, need not be pleaded or proved.[15] Paragraph 4 of the petition is deemed amended by inserting at the end thereof the words: "All of the schools referred to in paragraph '2' of this
173 petition are within Union Free School District Number Nine and under the jurisdiction and control of Respondents.", and the answers of Respondents and Intervenors are deemed answers to the petition as thus amended.

Whether the petition alleges facts sufficient to establish that the Board failed to perform a duty enjoined by law is largely dependent upon a determination of the constitutional duty imposed. For reasons hereafter set forth at length, it is held that while the Board may authorize, it may not require, the saying of the prayer in question, but that if it does so, it must bring
174 the authorization to the attention of parents of children in the schools, establish a procedure for excusing non-participants not only from saying the prayer but from the room, if they so elect, and take affirmative steps to protect the religious freedom of both non-participants and participants.

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[13] Lake Mahopac Heights, Inc. v. Zoning Board, 119 N. Y. S. 2d 809, n.o.r.

[14] People v. Wood, 131 N. Y. 617; Armstrong v. Cummings, 20 Hun. 313.

[15] Shaw v. Tobias, 3 N. Y. 188; CARMODY-WAIT, Vol. 3, p. 472.

The petition alleges that the Board by resolution directed that the prayer be said as a daily procedure and that it is being said aloud each day in the schools of the district, that the saying of the prayer and the manner and setting in which it is said are contrary to the religious practices of those petitioners and their children who are believers and contrary to the beliefs concerning religion of those petitioners and their children who are non-believers, and that demand has been made for discontinuance of the prayer and refused by respondent Board. What is alleged 176
thus shows violations of constitutional duty in that (1) the Board has required rather than authorized the daily use of the prayer, and (2) the manner of its being said does not protect the rights of non-believers or the religious scruples of all of the believers. What is alleged is a "due process" rather than an "equal protection" question and it, therefore, is not necessary to allege or prove purposeful discrimination in administration of the resolution.[16] While a presumption of constitutionality might, in view 177
of the absence of allegations of fact showing compulsion,[17] warrant the Court in construing the Board's direction as being in fact only an authorization, such a presumption, if one exists in

[16] Matter of Diocese of Rochester v. Planning Board, *supra*, n. 10, at p. 521.

[17] The petition alleges in language substantially the same as that used in the petition in Zorach v. Clauson, 343 U. S. 306, that the saying of the "prayer and the manner and setting in which it is said have necessarily resulted in the exercise of coercion upon the children," but this is a conclusory allegation and does not implicate the Board. See 343 U. S. 306, 311, n. 7, *cf. ibid.* at 321.

religious cases,[18] cannot supply the missing safeguards which the constitutional privilege of free exercise mandates. The petition states a cause of action, therefore.

The foregoing disposes of all of the Board's defenses except the sixth, which sets up the constitutional right of children other than petitioners' to say the prayer free from interference, and of all procedural questions except petitioners' motion for a jury trial and the determination of petitioners' standing to sue. For reasons here-
179 after set forth the defense is held to be without merit and the motion for jury trial is denied.

Petitioners' standing to sue is established by the *Zorach* case as a matter of both New York[19] and federal[20] law. This results not only from the fact that petitioners are parents of children who are currently attending the schools subject to the program but also from the fact that the prayer and the manner and setting in which it is said are contrary to the beliefs of petitioners and their children.[21] There will have been "actual interference"[22] with the religious freedom of
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[18] See, e.g., Prince v. Massachusetts, 321 U. S. 158, 167, "It cannot be sustained by any presumption of validity."

[19] Matter of Zorach v. Clauson, 303 N. Y. 161. The concurring opinion of Judge Desmond raises objections on the point which clearly do not apply to the instant case. See also Baer v. Kolmorgen, 14 Misc. 2d 1015.

[20] Zorach v. Clauson, *supra*, n. 17, 309, n. 4, which distinguished Doremus v. Board of Education, 342 U. S. 429. Accord: McCollum v. Board of Education, 333 U. S. 203, 206.

[21] Note 66 Harv. L. R. 89, 120.

[22] United Public Workers of America v. Mitchell, 330 U. S. 75, 89.

petitioners and of their children unless they are given notice of and an opportunity to make a conscious choice concerning participation in the prayer, and unless steps are taken to see that their freedom not to participate is respected.

Since it has been suggested that § 801 and § 3204 of the Education Law impose a duty on the Board of Regents, and that respondent Board in requiring the prayer was only carrying out a duty imposed on it by the Regents, the legal status of respondent Board should also be ascertained. 182
The Board of Education of a Union Free School District exists as a separate body corporate.[22] As such it is distinct from the Board of Regents, which heads the Department of Education and which appoints, and at pleasure may remove, the Commissioner of Education.[24] The Commissioner of Education is the chief executive officer of the Board of Regents, enforces the laws relating to education, and carries out the policies of the Board of Regents.[25] Attendance of minors from seven to sixteen years of age upon full time day instruction is compulsory[26] and instruction is required by statute in particular subjects.[27] Neither 183
prayer nor religion is mentioned in the law, except that because of their religious beliefs, children may be excused, under regulations of the

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[23] Education Law, § 1701; Judd v. Board of Education, 278 N. Y. 200.

[24] N. Y. Const., Art. 5, § 4 and Art. 11, § 2; Education Law, §§ 101 and 201.

[25] Education Law, § 305, subd. 1.

[26] *Ibid.*, § 3205. Such attendance may be at a public school or at a private or parochial school which meets the curriculum requirements established by the law. § 3204(1).

[27] *Ibid.*, § 3204, 801-810.

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Regents, from attendance at health or hygiene education[28] and absence for religious observance and education must be permitted under rules established by the Commissioner.[29] The Regents must prescribe courses in patriotism and citizenship which must be attended by all pupils over eight years of age, and in the history and meaning of the Declaration of Independence and the United States and New York Constitutions which must be attended by all pupils in the eighth and higher grades.[30] The contention that respondent
185 Board acted in furtherance of the Regents' directions issued under the foregoing provision cannot be sustained, however, for the provision speaks of "patriotic and civic service" and the fostering of "moral and intellectual qualities" whereas the documents issued by the Regents[31] concern themselves with not only those problems but also "spiritual training". Further, those documents make no reference to the provision and are entitled "Regents Statement" and "Regents' Recommendations", obviously not mandatory prescriptions. Further, the Board's answer, in-
186 sofar as it relies on a direction that no child is to be required to join in the prayer, is inconsistent with such a contention, since the statute is compulsory and the legislature made no provision for exception. Finally, neither the Regents' Statement nor the Board's resolution makes the

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[28] *Ibid.*, § 3204(5).

[29] *Ibid.*, § 3210 (1)(b) and (2)(b).

[30] *Ibid.*, § 801. Respondent relies also on § 1709(5) read together with § 801. Since for the reasons given in the text, § 801 does not impose a duty, § 1709(5) does not either.

[31] *Supra*, n. 5.

distinction that the statute does between children over and under the age of eight years. It follows, therefore, that the Board's resolution, though referring to and inspired by the Regents' Statements, must be considered voluntary and that the Regents' policy and program set forth in those statements are involved in this decision only insofar as they form the background for and are referred to in the action of the Board. In short, what is to be considered is the power of the Board, unsupported by any administrative, legislative or constitutional requirement that it 188
provide spiritual training or adopt the resolution of July 8, 1958.

THE CONSTITUTIONAL QUESTIONS

We are brought then to a determination of the constitutional issues. The question is a close one, and since, as Mr. Justice Holmes observed the "controversies are apt to be fierce in proportion to the nicety of the question",[32] a few general observations are, perhaps, in order. In the first place, a judge's task in such a determination 189
is "never [to] substitute his personal appraisal of the interests at stake, or his personal preference between them * * * [but rather] * * * to decide how those who have passed the 'enactment' would have dealt with the 'particulars' before him, about which they have said nothing whatever."[33] Second, the emotionalism generated by such controversies necessitates careful analysis of the arguments made in order to place them in proper

[32] HOLMES-POLLOCK LETTERS (1941) Vol. I, p. 216.
[33] HAND, THE SPIRIT OF LIBERTY (1952), 216.

perspective, to exclude purely policy matters and to reject *in terrorem* contentions made without substantial basis. Thus, the thesis that the present rate of juvenile delinquency evidences the need for prayer in the schools is a matter of policy and of no weight in determining what constitutional provisions framed in 1789 and 1865 mean.[34] So also while it may validly be argued that the appointment of chaplains by the Congress in 1791 represents a practical construction by the Congress responsible for the First Amendment of its meaning, the fact that the appropriation acts covering the pay of Congressional chaplains has never been held invalid is of no weight, since no citizen has standing to bring an action to prevent such a payment.[35] Again, Franklin's suggestion to the Constitutional Convention of daily prayer as a

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[34] More in point would be the fact that Patrick Henry made the same argument in 1784 in support of the Bill Establishing a Provision for Teachers of the Christian Religion (BRANT, JAMES MADISON, THE NATIONALIST [1948] 344) that the initial passage of the Bill by the Virginia Legislature provoked Madison's famous Memorial and Remonstrance, and that, as a result, the assessment plan which the Bill would have imposed was killed by the next session of the Legislature.

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[35] Elliott v. White, 23 F. 2d 997. Likewise persons with standing may choose not to act for personal reasons, e.g.—Madison though he thought thanksgiving proclamations a "deviation from the strict principle" nonetheless "found it necessary to follow the example of his predecessors." Letter to Edward Livingston, quoted in STOKES, CHURCH AND STATE IN THE UNITED STATES (1950), Vol. I, p. 491, and it is hardly to be expected that the winner of a coveted appointment to one of the armed forces academies, or his parents, will institute action to declare unconstitutional the academy's regulation covering compulsory chapel.

means of breaking its deadlock assumes lesser proportion when it is realized that the suggestion, though seconded, was not adopted by the Convention.[36] Similarly, to be rejected, in view of the essentially different nature of prayer on the one hand from the study of historical fact on the other, is the specter of "Godless" schools in which, if the prayer here involved is not sanctioned, references to God in the Constitution and the Declaration of Independence will not be permitted. In sum, the constitutional line to be drawn can only be determined by an analysis of 194
the fact situation involved, the history of the constitutional provisions, and the holdings (together with but distinct from the language used in stating those holdings) of judicial decisions construing the constitutional provisions (or provisions essentially similar).

The Fact Situation

The facts on which the constitutional determination is to be made encompass those drawn from the answer and answering affidavit as well as 195
from the petition and reply.[37] For purposes of clarification, they are restated as follows: Petitioners are citizens, resident in Union Free School District Number Nine, whose children, pursuant to the Education Law, attend schools run by the District. Petitioners include members of the Jewish faith, of the Society for Ethical Culture, of the Unitarian Church, and one non-believer. The respondent Board on July 8, 1958, by majority

[36] Stokes, *supra*, n. 35, Vol. I, pp. 454-455.

[37] Civil Practice Act, §§ 1291, 1292, 1295, 1296.

vote resolved "that the regents prayer be said daily in our schools" and "gave direction to the District Principal that this be instituted as a daily procedure to follow the Salute to the flag." The prayer referred to, the words of which are set forth at the beginning of this opinion, originated in the Regents Statement on Moral and Spiritual Training in the Schools adopted November 30, 1951, which statement was supplemented by the Regents' Recommendations for
197 School Programs on America's Moral and Spiritual Heritage adopted March 25, 1955.[38] It is said aloud at the commencement of the school day, by each class, in the classroom in the presence of a teacher. Though not specifically incorporated in the Board's resolution, or otherwise publicized, the Board directed that no child was to be required or encouraged to join in the prayer against his or her wishes; only one request that a child be excused from saying the prayer was received in the schools of the district, which request was respected; and no child has directly asked to be excused from joining in the prayer nor has either
198 a parent or a child sought permission for a child to leave the classroom during the saying of the prayer.[39] The saying of the prayer and the man-

[38] Too long to set forth herein at length, but such language therefrom as is directly pertinent will be referred to in later portions of this opinion.

[39] The facts in the noted sentence are drawn from the affidavit of William J. Vitale, Jr., President of the Board. The allegation of paragraph 10 of the petition that "During the saying of the prayer, no student is permitted to leave the classroom," is not inconsistent with the facts thus found, and petitioners have not availed themselves of the opportunity to controvert those facts in a reply affidavit. They are, therefore, taken as true.

ner and setting in which it is said are contrary to the religion and religious practices of those petitioners, and their children, who are believers, and to the beliefs concerning such matters held by the petitioner, and his children, who are non-believers.[40] Petitioners have demanded that the saying of the prayer in the schools of the district be discontinued, which respondents have refused to do.

The Nature of Prayer and of the Instant Prayer 200

The first inquiry to which we are brought by the facts above found is the nature of prayer. The dictionary definitions include: "Act of addressing supplication to a divinity or object of worship; the offering of adoration, confession, supplication, thanksgiving, etc., to a God", "the form of words used in praying", "a form of religious service or worship for public or common use, consisting largely of prayers; as Morning or Evening *Prayer*."[41] The religious nature of 201

[40] The facts found in the noted sentence are drawn from paragraphs 12 and 13 of the petition. While denied by both the Board and the intervenors, religion and beliefs concerning religion are subjective matters into which the Court cannot inquire, United States v. Ballard, 322 U. S. 78, rev. o.g. 329 U. S. 187; Fowler v. Rhode Island, 345 U. S. 67, 70, except, perhaps, to determine whether the beliefs are held in good faith. Neither the Board nor intervenors have denied petitioners' good faith or ask for a trial of the question.

[41] Webster's New International Dictionary (2d Ed., 1948).

prayer was recognized by Jefferson [42] and has been concurred in by theological writers,[43] the United States Supreme Court [44] and state courts [45] and administrative officials,[46] including New

[42] He refused to proclaim a day of thanksgiving on the ground that the First Amendment would be violated by his so doing. In his letter of January 23, 1808 to Rev. Samuel Miller explaining his position, Jefferson stated: "Fasting & prayer are religious exercises. The enjoining them an act of discipline. Every religious society has a
203 right to determine for itself the times for these exercises, & the objects proper for them, according to their own particular tenets; * * *" WRITINGS OF THOMAS JEFFERSON (FORD Ed.) Vol. IX, p. 175.

[43] FOSDICK, MEANING OF PRAYER (1916), 32, describes prayer as "communion with God"; HEILER, PRAYER (1932), 362, concurs in this definition and concludes that "prayer is the center of religion." A medieval proverb tells us that "Prayer without devotion is like a body without a soul", UNION PRAYER BOOK (1940), Vol. I, p. 4.

[44] Fowler v. Rhode Island, *supra*, n. 40, at p. 70: "Sermons are as much a part of a religious service as prayers"; United States v. Ballard, *supra*, n. 40, at p. 87: "the power of prayer * * * deep in the religious convictions of many"; Church of the Holy Trinity v. United States,
204 143 U. S. 457, in which in expounding the thesis that this is a religious nation the Court referred, at p. 471, to "the custom of opening sessions of all deliberative bodies and most conventions with prayer."

[45] Agreeing that prayer is a religious exercise, religious worship, part of religion: Spiller v. Inhabitants of Woburn, 94 Mass. 127; Moore v. Monroe, 20 N. W. 475 (Iowa); State *ex rel.* Weiss v. District Board, 44 N. W. 967 (Wisc.); State *ex rel.* Freeman v. Scheve, 91 N. W. 846 (Neb.); *idem* 93 N. W. 169 (Neb.); Hackett v. Brooksville Graded School Dist., 87 S. W. 792 (Ky.); People *ex rel.* Ring v. Board of Education, 92 N. E. 251 (Ill.); Herold v. Parish Board, 68 So. 116 (La.); State *ex rel.* Finger v. Weedman, 226 N. W. 348 (S. D.).

[46] 1909-1910 Op. Atty Gen.—Wash. 135; 25 Cal. Ops. Atty. Gen. 316 (1955).

York's Commissioner of Education.[47] A Committee of the New York Legislature has agreed.[48]

The Board of Regents as *amicus curiae*, the respondents and the intervenors all concede the religious nature of prayer, but seek to distinguish this prayer because it is based on our spiritual heritage. On this score, they argue that it is established that this is a religious nation, that many examples exist of the religious belief of the Founding Fathers, that the wording of the prayer in invoking "Almighty God", in acknowledging "our dependence upon Thee" and in asking "Thy blessings" is derived from national organic documents, that the prayer is to be said in conjunction with the Pledge of Allegiance and "as an incident to the Pledge of Allegiance ceremony", that it was recommended with the understanding that no child would be forced to say it, and that the recommendation was silent as to requirements respecting attire, posture, gestures and the like.[49] The argument proves too much, both as to "establishment" and "free exercise". If it be

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[47] Matter of Dargin, 72 N. Y. St. Dept. Rep. 27 (1951), which held that a baccalaureate service could not be held in the schools because "a religious service". The decision noted, however, that this was not intended to prohibit the opening and closing of school functions with customary invocation and benediction. The decisions of the Commissioner's predecessor referred to in note 3 *supra* are based on recognition of the religious nature of prayer. 207

[48] BLAU, CORNERSTONES OF RELIGIOUS FREEDOM IN AMERICA (1949), 136ff. recounts a controversy over payment of a legislative chaplain ending in a report in 1832 stating (p. 146) "Prayer is not a civic, but *religious* duty." The provision for payment was repealed the next year.

[49] The burden of the argument is set forth in the Statement and Recommendation referred to in note 5, *supra*, and those documents contain many historical examples.

assumed for the moment that the Constitution prohibits prescription of mode of worship and that, therefore, prayer may not be prescribed, the state's interest in familiarizing students with the religious nature of our heritage would not justify the use of prayer as a vehicle for imparting that knowledge since there are other equally effective and constitutionally uninhibited means of achieving that end. If, on the other hand, the purpose is to inculcate in pupils a love of God,[50] then as
209 we shall hereafter see, as an exercise required of all pupils, it would constitute religious instruction in violation of the "establishment" clause and as a permissive exercise it would, unless it gives positive recognition to the right of any participating child to adopt any posture, use any gesture, wear any attire, use any language, or follow any other practice which his or her own religious beliefs may dictate, violate the "free exercise" clause of the federal and state constitutions, as well as the parent's rights, hereafter discussed, under the due process clause to
210 control the education of his child.

It is, however, also contended that the recognition of prayer is an integral part of our national heritage, and that, therefore, the "establishment" clause cannot have been intended to outlaw the practice in schools any more than from the rest of public life; that is, that prayer in the schools is permissible not as a means of teaching "spiri-

[50] The Statement speaks of the prayer as "this act of reverence to God" and of the school's function of "ever intensifying in the child that love for God, for parents and for home which is the mark of true character training." Of course, respondent Board is not bound by the Statement.

tual values" but because traditionally, and particularly at the time of the adoption of the First and Fourteenth Amendments, this was the accepted practice. With this argument the Court agrees. To spell out the reasons for this conclusion, however, requires reference to history.

THE HISTORY OF THE CONSTITUTIONAL PROVISIONS AND OF PUBLIC EDUCATION

Although the writings of Jefferson and Madison are often referred to on matters of constitutional 212
interpretation, it was Jefferson's view that in such matters one should "recollect the spirit manifested in the debates, and * * * conform to the probable [meaning] in which it was passed",[51] and Madison argued that "It is the sense of the nation, therefore, not the sense of the General Convention, that is to be consulted; and that sense, if not taken from the act itself, is to be taken from the proceedings of the State Conventions & other public indications as the true keys to the sense of the Nation".[52] Unfortunately, as Story pointed out,[53] the varying interpretations presented in such state 213

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[51] Letter of June 12, 1823 to William Johnson, THE WRITINGS OF THOMAS JEFFERSON, (FORD Ed.), Vol. X, p. 231.

[52] Fleet, *Madison's "Detached Memoranda"*, 3 Wm. & Mary Quarterly Hist. Mag. (3rd Ser.) 534, 544. On this ground Maxwell v. Dow, 176 U. S. 581, 601, rejected statements in Senate speeches on the passage of the Fourteenth Amendment offered to prove that the first eight amendments of the Bill of Rights had been incorporated in that Amendment.

[53] COMMENTARIES ON THE CONSTITUTION (1833), 406.

conventions makes them at best uncertain and inconclusive criteria. Generally, then, in construing the constitution, one must look to the history of the times and examine the state of things when the provision in question was adopted.[54]

The history of the adoption of the Fourteenth Amendment has been examined in three exhaustive studies.[55] While they show that Congressman Bingham and Senator Howard in debate indicated the purpose of the Amendment to be to guarantee the personal rights protected by the first eight
215 amendments against state action,[56] the Supreme Court has within the last few months once again refused to adopt this thesis,[57] and in any event these are general references, making no specific allusion to the guarantees concerning religion. The closest such was Bingham's reference, in a

[54] Rhode Island v. Massachusetts, 12 Pet. 657, 723. So in Reynolds v. United States, 98 U. S. 145, the Supreme Court turned to the history of the times to ascertain the meaning of "religion" as used in the First Amendment.

[55] FLACK, ADOPTION OF THE FOURTEENTH AMEND-
216 MENT (1908); Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights?*, 2 Stan. L. R. 5; JAMES, THE FRAMING OF THE FOURTEENTH AMENDMENT, Illinois Studies in Social Sciences, Vol. 37 (1956).

[56] FLACK, *supra*, n. 55, pp. 80, 84, 86.

[57] Bartkus v. Illinois, 359 U. S. 121, decided March 30, 1959, in which the Court stated (at p. 124): "The relevant historical materials * * * demonstrate conclusively that Congress and the members of the legislatures of the ratifying States did not contemplate that the Fourteenth Amendment was a short-hand incorporation of the first eight amendments making them applicable as explicit restrictions upon the States."

speech accepting his renomination to Congress, to his part in framing the first section of the Fourteenth Amendment, which "he said, placed the golden rule in the Constitution".[58]

If we turn then from constitutional history to the history of the times, we find that by 1868, when the Fourteenth Amendment was ratified, "the separation of public education from Church entanglements, of the State from the teaching of religion, was firmly established in the consciousness of the nation",[59] but that such separation did not extend to the exclusion of prayer or the reading of the Bible from public school routines. While 218
some of the state constitutions then in force contained provisions forbidding sectarian instruction or the use of public funds for denominational

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[58] JAMES, *supra*, n. 55, p. 160. The speech was made August 10, 1866. In it Bingham gave as an example that men in Georgia would not be imprisoned, as they had been in the past, for teaching the Bible. In debate on the bill to implement the Fourteenth Amendment, Bingham was somewhat more specific as to his intentions (Cong. Globe, 42nd Cong., 1st Sess., App. pp. 83-85), 219
but this was on March 31, 1871, long after the amendment had been ratified. Brown v. Board of Education of Topeka, 347 U. S. 483, 490 notes also that there is "little in the history of the Fourteenth Amendment relating to its intended effect on public education."

[59] Mr. Justice Frankfurter, concurring in the McCollum case, *supra*, n. 20, at p. 217. He referred to 1875, when President Grant's speech brought the matter to a head nationally, but it was equally true in 1868. The status of public education at the time the Amendment was adopted is also footnoted in Brown v. Board of Education, *supra*, n. 58, at p. 489, n. 4.

schools, or both,[60] the schools were generally opened with prayer.[61] Massachusetts had a law requiring the reading of the Bible in the schools,[62] and New York's Superintendent of Common Schools had ruled no less than five times that prayer and Bible exercises could be conducted in the schools before school hours, but could not be made compulsory.[63] Only two cases dealing with the Bible in the schools had reached the appellate courts; in both use of the Bible was allowed to
221 continue, in one on the basis of its literary value, in the other, in effect, because the regulation included provision for excuse.[64] The controversy

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[60] The state constitutional provisions and their adoption dates are tabled in O'NEILL, RELIGION AND EDUCATION UNDER THE CONSTITUTION (1949), 140ff. and CUBBERLEY, PUBLIC EDUCATION IN THE UNITED STATES (1919), 180. The latter lists fourteen states with such provision by 1868. Bible reading and prayer may, of course, infringe such a state provision, see cases cited *infra* notes 154-158, and if compulsory will also, as is hereafter demonstrated, violate the First and Fourteenth Amendments.

222 [61] BEALE, A HISTORY OF FREEDOM OF TEACHING IN AMERICAN SCHOOLS (1941), 95.

[62] JOHNSON & YOST, SEPARATION OF CHURCH AND STATE (1948), 33. It should be noted that almost the entire legislature and administration elected in 1854 were Know-Nothings. BILLINGTON, THE PROTESTANT CRUSADE (1938), 412.

[63] *Op. Cit., supra*, n. 3.

[64] Donahoe v. Richards, 38 Me. 379 (1854); Spiller v. Inhabitants of Woburn, *supra*, n. 45 (1866). A Boston Police Court case which attracted wide enough attention to cause its reprinting in separate pamphlet form and in a Pennsylvania legal publication, Comm. on Complaint of Wall v. Cooke, 7 Am. L. Reg. 417 (1859), exonerated from liability for criminal assault a teacher who beat with a rattan stick a Catholic child who refused, on instruction of his father and his priest, to say the Lord's Prayer or repeat the Ten Commandments.

which began in the late 1830's over religion in the schools and public support of parochial schools included as one of its facets mandatory Bible reading and prayers in the schools,[65] the Catholic minority seeking to exclude the Bible and prayer, the Protestant majority strenuously opposing such exclusion. The battle that followed saw the formation in 1864 of the National Association to secure the Religious Amendment to the Constitution, an organization dedicated to having God and the Bible recognized in the Constitution,[66] and the
counter organization of the Liberal League whose 224
demands included the discontinuance of all religious instruction, and particularly use of the Bible in the schools.[67] The climax of the controversy came with President Grant's 1875 address to the Army of the Tennessee inveighing against public support of sectarian schools[68] and his annual message of that year calling for an amendment requiring the states to maintain public schools and forbidding the teaching in them of

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[65] Connors, Church State Relationships in Education in the State of New York (1951), 56. Connors 225
records, at p. 76, that the Catholic Second Plenary Council of Baltimore in 1866 enjoined pastors to keep watch "lest their Catholic children use Protestant versions of the Bible, sing sectarian hymns ,or recite prayers in the schools."

[66] Lardner, *How Far Does the Constitution Separate Church and State*, 45 Am. Pol. Sci. Rev. 110, 120; Blau, *op. cit., supra*, n. 48, at 203.

[67] Blau, *supra*, n. 48, at 208.

[68] Stokes, *supra*, n. 35, sets forth the address (Vol. II, p. 722) and notes the editorial comment of the Catholic World which reported the address, that this meant no support to the then system of common schools, "because they are sectarian."

religious, atheistic or pagan tenets.[69] This was followed in 1876 by the introduction of the Blaine Amendment, which would have incorporated that principle in the federal constitution, and the inclusion in the Republican Party platforms of 1876 and 1880 of planks supporting Grant's position.[70] Although the Amendment was defeated in the Senate, its defeat was apparently not due to opposition to its principle,[71] and was followed by adoption of similar provisions in the constitutions
227 of most, if not all, of the states which did not have such provisions, and in a Congressional requirement that newly admitted states include in their constitutions a provision for maintenance of a school system free from sectarian control.[72]

Notwithstanding the strong current of opinion thus demonstrated, the history of the times shows that it did not extend to the exclusion of the Bible and prayer from the schools. Thus out of the New York phase of the battle came an 1844 Act of the Legislature prohibiting New York City's Board of Education from excluding Bible reading, without
228 note or comment, but prohibiting it from directing

[69] 4 Cong. Rec. 175.

[70] Lardner, *op. cit., supra*, n. 66, at p. 121, where it is also noted that the Democrats affirmed adherence to the principle of separation but opposed the Republican proposal as invading states' rights.

[71] PFEFFER, CHURCH, STATE AND FREEDOM (1953), 131, explains the defeat as partly partisan and partly resulting from the belief that state constitutions adequately dealt with the question. See also Justice Frankfurter concurring in McCollum v. Board of Education, *supra*, n. 20, 219, n. 6.

[72] *Ibid.*, and see O'NEILL and CUBBERLEY, *loc. cit., supra*, n. 60.

which version should be read;[73] its Massachusetts phase required Horace Mann, often referred to as the father of the American public school system, to defend himself against a charge that as Secretary of the state Board of Education, he sought to drive religion from the schools, with the denial "that I have ever attempted to exclude religious instruction from school, or to exclude the Bible from school";[74] its national phases saw the rise of the Know-Nothings and the American Protestant Association, both bitterly anti-Catholic organizations,[75] the ensuing formation of the American Party and the adoption in 1855 by that party of a platform which favored maintenance of undenominational schools but declared that the Bible "should not be excluded from the public schools",[76] and the inclusion in the Senate version of the Blaine Amendment of a specific provision that "This article shall not be construed to prohibit the reading of the Bible in any school or institution".[77] And during all this period, McGuffey's Third Reader, first published in 1837, revised in 1843, 1853, 1878, 1896 and 1901, and widely used in schools throughout the United States over a period of seventy years,[78] included the Lord's

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[73] Laws of 1844, Chap. 320, § 12, which became § 1151 of the Greater New York City Charter and was the subject of Lewis v. Board of Education, *infra*, n. 148.

[74] CULVER, HORACE MANN AND RELIGION IN THE MASSACHUSETTS PUBLIC SCHOOLS (1929), 204; compare PFEFFER, *supra*, n. 71, at 285.

[75] STOKES, *supra*, n. 35, Vol. I., p. 820ff., 833ff.; PFEFFER, *supra*, n. 71, 374ff.; SWEET, THE STORY OF RELIGION IN AMERICA (1930), 394.

[76] GREENE, RELIGION AND THE STATE (1941), 110.

[77] 4 Cong. Rec. 5453, see also Meyer, *The Blaine Amendment and the Bill of Rights*, 64 Harv. L. R. 939.

[78] VAIL, HISTORY OF THE MCGUFFEY READERS (1911).

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Prayer (though in slightly revised form, as a poem), an Evening Prayer and a Child's Hymn. The conclusion is inevitable that in 1868, the "sense of the nation", to revert to Madison's phrase, could not be read as indicating, by ratification of the Fourteenth Amendment, the exclusion of the Bible or of prayer from the public schools.[79]

Is there anything in the history of the First Amendment that might lead to a contrary conclusion? If we look at the history of the period in which Madison introduced his proposed amend-
233 ments, we find that church establishments were still maintained in Massachusetts, Connecticut, New Hampshire, South Carolina and Maryland,[80] that education was largely a matter of church

[79] BUTTS, AMERICAN TRADITION IN RELIGION AND EDUCATION (1950), 137, BATES, RELIGIOUS LIBERTY (1945), 92, and STOKES, *supra*, n. 35, Vol. II, p. 493, record the variations in legal requirements and consequent doubt concerning Bible reading and prayer in the schools. The situation in 1870 is graphically illustrated by the delivery in New York City, and publication in pamphlet form, in that year of sermons for (BOOLE, OUR BIBLE,
234 OUR SCHOOLS AND OUR FLAG, ONE AND INSEPARABLE) and against (SPEAR, THE BIBLE IN THE PUBLIC SCHOOLS) the Bible in the schools, and the publication in that year by a former New York Supreme Court Justice of a book proposing an amendment to the Federal Constitution (HURLBUT, SECULAR VIEW OF RELIGION IN THE STATE), one of his aims being the exclusion of the Bible and prayer from the schools (*ibid.*, at p. 46).

[80] ZOLLMAN, AMERICAN CHURCH LAW (1933) 4, and STOKES, *supra*, n. 35, Vol. I, p. 433 both include South Carolina; PFEFFER, *supra*, n. 71, p. 126, does not. All were multiple establishments. It was not until 1833 that the last establishment, in Massachusetts, was terminated. GREENE, *supra*, n. 76, at p. 94.

schools [81] and that, as would be expected under church aegis, prayer, and indeed religious instruction, were a regular part of school routine.[82] The fact that Madison's fifth proposal, that "No State shall violate the equal rights of conscience" failed of adoption; [83] the various versions through which his fourth proposal, which became the First Amendment, passed; [84] and the language of the final provision that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof"; made it clear, 236
and it was early so held,[85] that the First Amend-

[81] The history of colonial education was developed by Mr. Justice Frankfurter in his McCollum concurring opinion, *supra*, n. 20, 213-215, and is also recorded in CUBBERLEY, *supra*, n. 60, at pp. 44, 53; PFEFFER, *supra*, n. 71, at 274; KELLER; ALL GOD'S CHILDREN (1953), 277ff.; BATES, *supra*, n. 79, 210ff.; STOKES, *supra*, n. 35, Vol. II, p. 45ff.

[82] STOKES, *supra*, n. 35, Vol. II, p. 53; LARDNER, *supra*, n. 60, at p. 122; CUBBERLEY, *supra*, n. 60, at p. 28; CONNORS, *supra*, n. 65, at pp. 2-4, 14; PFEFFER, *supra*, n. 71, at p. 278.

[83] DUMBAULD, THE BILL OF RIGHTS AND WHAT IT 237
MEANS TODAY (1957), 46, 207.

[84] DUMBAULD, *ibid.*, 39, 45, set forth the history with appropriate references to the Annals of Congress and the Journal of the Senate, and in separate Appendices reprints the amendments as offered by Madison, as reported by the Select Committee, as passed by the House, as passed by the Senate and as agreed to after conference and finally proposed to the states. See also Perry, SOURCES OF OUR LIBERTIES (1959), 422-425; STOKES, *supra*, n. 35, Vol. I, 538-548; Sullivan, *Religious Education in the Schools*, 14 Law and Cont. Pro. 92, 106ff.

[85] Permoli v. Municipality No. 1 of the City of New Orleans, 3 How. 589, 609, decided in 1845 first applied the principle to the religion provisions. Barron v. The Mayor and the City Council of Baltimore, 7 Pet. 243, decided in 1833, had held that the Bill of Rights was not intended to restrain the states.

ment had no application to the states. The only phase of the history of the Amendment related to prayer was the proposal, made in the Senate, that "Congress shall make no law establishing articles of faith or a mode of worship * * *." The attempt to thus limit the Amendment was rejected, but indicates that even those who sought a limited form of restriction agreed that the prohibition against establishment extended to "mode of worship," which would include prayer. One must conclude from the debates and the history,
239 therefore, that the First Amendment's relationship to prayer was general, in the sense that there should be no compulsion to recite a prescribed form of prayer, rather than specific, in the sense that the then existing routine of prayer should be excluded from the schools.

If we ignore the limits of constitutional history above set forth, and examine into the individual views of the Founding Fathers,[56] we are brought to no different conclusion. Thus, as we have noted above, Franklin both wrote his own version of the Lord's Prayer and suggested the efficacy of daily
240 public prayer to the Constitutional Convention. As concerns Madison, though in later life he changed his views,[57] he was a member of the committee of Congress which arranged for a Con-

[56] Mr. Justice Jackson called such materials "as enigmatic as the dreams Joseph was called upon to interpret for Pharaoh". Youngstown Sheet & Tube Co. v. Sawyer, 343 U. S. 579, 634.

[57] In the "Detached Memoranda", he took the position that both legislative and service chaplains were violations of the constitution, but could be considered *de minimus*, Fleet, *op. cit. supra*, n. 52, at 558-560.

gressional Chaplain,[28] and served with Jefferson on the Board of Visitors of the University of Virginia which in its 1822 report and 1824 regulations permitted use of rooms in the main building for religious worship.[29] Jefferson, who thought the prescription of a day of prayer so far a violation of the First Amendment and the reserved powers of the states as to prohibit him from proclaiming a Thanksgiving Day, nonetheless provided in his 1817 draft of a bill to establish a public school system in Virginia only that "no religious reading, instruction or exercise shall be 242
prescribed or practiced, *inconsistent with the tenets of any religious sect or denomination*";[30] and also participated in the adoption (as did Madison) of the 1824 regulations for the University of Virginia providing that "students of the University will be free, and expected to attend

[28] BRANT, JAMES MADISON, FATHER OF THE CONSTITUTION (1950), 272, which however is careful to note that this was in 1789, before there was a constitutional provision.

[29] BUTTS, *supra*, n. 79, at p. 119, which however, notes that on April 21, 1825, Jefferson wrote a letter refusing 243
permission to hold religious services in a University building, which apparently overlooked the 1824 regulations. Madison in an 1824 letter spoke of the use of a public hall for religious exercises which students were free to attend or not as they chose, and said that it presented some difficulties but seemed the best plan of escaping the problem of theological professorships. Brant, *Madison: On Separation of Church and State*, 8 Wm. & Mary Quarterly Hist. Mag. (3rd Ser.) 3, 20.

[30] Italics supplied. The language is from Section 11 of Jefferson's 1817 "Bill for Establishing a System of Public Education", which is reprinted in HONEYWELL, EDUCATIONAL WORKS OF THOMAS JEFFERSON (1931), 235. The bill was not enacted (*Ibid.*, 65).

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religious worship at the establishment of their respective sects, in the morning, and in time to meet their school in the University at its stated hour".[91] While the strength of view and breadth of vision of Madison's famous Memorial and Remonstrance[92] and Jefferson's Republican Notes on Religion[93] may be considered the core of thought embodied in the First Amendment,[94] there is nothing in any of those documents that indicates an intention on the part of either author to exclude the routine of prayer from the schools,
245 provided only that that routine be not compulsory.

THE DECISIONAL LAW

Since our conclusion must, then, be that neither the sense of the nation, the debates, nor the individual views of the framers proscribe prayer as the ceremonial opening of a school day, we turn to the decisional law. As above noted, the Supreme Court early adopted the position that the
246 First Amendment did not apply to the states; until 1922, it continued to assert this view despite

[91] *Ibid.*, 274.

[92] Which is reprinted in BLAKELY, *supra*, n. 1, at p. 83, and as an appendix to Mr. Justice Rutledge's dissent in Everson v. Board of Education, 330 U. S. 1, 66.

[93] Which reprinted, in 1803, that portion of NOTES ON THE STATE OF VIRGINIA (1784) relating to religion (Query XVII) together with the Act for Establishing Religious Freedom. Both are also set forth in PADOVER, THE COMPLETE JEFFERSON (1943), 673 and 946, and BLAU, *supra*, n. 48, at pp. 74 and 76.

[94] See Lævitan, *Mr. Justice Rutledge*, 34 Va. L. R. 526, 533-535; Reynolds v. United States, *supra*, n. 54 at p. 164.

the passage of the Fourteenth Amendment.[95] It also, within four years after the ratification of the Fourteenth Amendment, decided in the *Slaughter-House Cases*[96] that the privileges and immunities clause of that Amendment did not include the rights set forth in the first eight amendments. Despite repeated assaults on that position, the Court continues to adhere to it.[97]

Nonetheless, both the "free exercise"[98] and "establishment"[99] provisions of the First Amendment are now clearly applicable to the states. Though the early decisions so indicating 248

[95] Prudential Insurance Co. v. Cheek, 259 U. S. 530, decided in that year, held that (p. 543) "* * * neither the 14th Amendment nor any other provision of the Constitution of the United States imposes upon the states any restrictions about 'freedom of speech'".

[96] 16 Wall. 36.

[97] Mr. Justice Stone, in Hague v. C.I.O., 307 U. S. 496, 521, n. 1, refers to over fifty attempts, up to 1935, to upset the rule of the Slaughter-House Cases. Mr. Justice Frankfurter concurring in Adamson v. California, 332 U. S. 46, 61, referred to "the mischievous uses to which that clause would lend itself if its scope were not confined." 249

[98] Meyer v. Nebraska, 262 U. S. 390 (dicta); Hamilton v. Regents, 293 U. S. 245, 261; Cantwell v. Connecticut, 310 U. S. 296, 303; Minersville District v. Gobitis, 310 U. S. 586, 593; Chaplinsky v. New Hampshire, 315 U. S. 568, 571 (dicta); Jones v. Opelika, 316 U. S. 584, rev'd on rehearing 319 U. S. 103; Murdock v. Pennsylvania, 319 U. S. 105, 108; West Virginia State Board of Education v. Barnette, 319 U. S. 624, 639; Prince v. Massachusetts, *supra*, n. 18, at 164 (dicta); Marsh v. Alabama, 326 U. S. 501, 504; Fowler v. Rhode Island, *supra*, n. 40.

[99] Everson v. Board of Education, *supra*, n. 92, at p. 8; McCollum v. Board of Education, *supra*, n. 20, at p. 210; Zorach v. Clauson, *supra*, n. 17, at p. 309.

relied on "free speech" cases and referred to infringement of the "liberty" protected by the due process clause, most of the later cases speak of the "First Amendment, made applicable to the states by the Fourteenth," without spelling out how, and consider and construe the language of the First Amendment as though it were directly applicable. None of the cases makes mention of the limitation implicit in the language of the due process clause: "deprive any person of life, liberty or property, without due process of law."
251 We need not now consider whether every "establishment" would constitute a deprivation of liberty or what leeway the phrase "without due process of law" allows for the exercise of legislative discretion in state "establishment" cases,[100] for the Court has established due process criteria (in other than religion cases to be sure, but which must nonetheless be considered applicable to such cases since the hypothesis is that they arise under the same clause) which must be held to exclude the school-prayer situation.

Thus, the court has held "from the beginning
252 and uniformly that the Due Process Clause of the Fourteenth Amendment does not apply to the

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[100] Wilkinson, *The Federal Bill of Rights and the Fourteenth Amendment*, 26 Geo. L. J. 439; Snee, *Religious Disestablishment and the Fourteenth Amendment*, 1954 Wash. U. L. Q. 371; Sutherland, *Due Process and Disestablishment*, 62 Harv. L. R. 1306; Warren, *The New "Liberty" under the Fourteenth Amendment*, 39 Harv. L. R. 431; Note, 67 Harv. L. R. 1016; Corwin, *The Supreme Court as National School Board*, 14 Law & Cont. Pro. 3. Professor Sutherland's views were further expounded before the American Council on Education and are reprinted in its 1957 report: THE STUDY OF RELIGION IN PUBLIC SCHOOLS; see also PFEFFER, *supra*, n 71, at p. 129.

States any of the provisions of the first eight amendments as such." [101] Only those provisions apply which are "implicit in the concept of ordered liberty" [102] and they are applied to prohibit action which is "repugnant to the conscience of mankind" [103] or which violates principles "so rooted in the tradition and conscience of our people as to be ranked as fundamental." [104] While the concept of ordered liberty clearly includes freedom of religion, with respect to both "establishment" and "free exercise", legislative permission for the non-compulsory public recital of 254
prayer cannot be said to be repugnant to the conscience of mankind. Indeed, when one recalls the tradition of prayer in the schools both before and after the inauguration of the public school system, in the Congress [105] and in other "deliberative bodies" and "conventions"; [106] and can point not only to a resolution, passed by Congress on the day after it passed the proposal which became the First Amendment, calling for the designation of "a day of public thanksgiving and prayer" [107] but also to recognition of that tra- 255

[101] Bartkus v. Illinois, *supra*, n. 57, p. 124.

[102] Palko v. Connecticut, 302 U. S. 319, at 325.

[103] *Ibid.*, at 323.

[104] Snyder v. Massachusetts, 291 U. S. 97, 105.

[105] Zorach v. Clauson, *supra*, n. 17, at p. 312.

[106] See Church of the Holy Trinity v. United States, supra, n. 44.

[107] The Senate concurred in the amendments and their being sent to the States on September 25, 1789, ANNALS OF CONGRESS, Vol. I, Col. 88, and concurred in the thanksgiving resolution on September 26, 1789, *ibid.* Col. 90. Objection was made that the resolution covered "a religious matter, and, as such, is proscribed to us", *ibid.*, col. 915. LINCOLN, CONSTITUTIONAL HISTORY OF NEW YORK (1906) 491, details the resolution of the Constitutional Convention of 1777, directing that August 27th of that year be observed throughout the state "as a day of fasting, humiliation and prayer".

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dition going back to Plato [108] and Plutarch,[109] one must conclude that due process does not proscribe legislative permission to say a non-compulsory prayer in the schools. "The traditions and habits of centuries were not intended to be overthrown when that [the Fourteenth] Amendment was passed." [110]

That public prayer does not fit the rubric of due process does not, however, dispose of the matter. Since the Court has dealt with the religion problems presented to it as though the First
257 Amendment were directly applicable to the states, we must ascertain the reach of its decisions with respect to prayer in the schools. To do that we must also understand the relationship of the parent and the state to the education of the child.

Meyer v. *Nebraska* [111] invalidated a Nebraska statute that prohibited the teaching of a foreign language in any school below the eighth grade. Holding that the statute denied due process to

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[108] Timaeus: "All men, Socrates, who have any degree of right feeling, at the beginning of every enterprise,
258 whether small or great, always call upon God". GREAT BOOKS OF THE WESTERN WORLD (1952), Vol. 7, p. 447.

[109] AGAINST COLOTES THE EPICUREAN, 31, Sec. 1135E: "a city without temples and without gods, making no use of prayer or oaths or divinations, nor sacrifices to obtain blessings or avert evils, there is no one, nor ever will be who has seen." Quoted by STOKES, *supra*, n. 35, Vol. I, p. 70.

[110] The quotation is from Holmes' opinion in Interstate Consolidated Street Ry. Co. v. Mass., 207 U. S. 79, 87, a due process "property" case which is otherwise not in point. See also Frank v. Maryland, 359 U. S. 360, 371: "* * * what free people have found consistent with their enjoyment of freedom for centuries is hardly to be deemed to violate due process."

[111] *Supra*, n. 98, p. 399.

both teachers and parents, the Court said that the Fourteenth Amendment protected the right "to acquire useful knowledge, to marry, to establish a home and bring up children, to worship God according to the dictates of his own conscience, and, generally, to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men." Though the end, that all might know English, was desirable, it could not be coerced. *Pierce* v. *Society of Sisters* [112] held invalid, as a denial of due process to both private school operators and parents, an Oregon statute requiring that all children attend public school. The Court's decision made clear that "The State may not standardize its children by forcing them to accept instruction from public teachers only. The child is not the mere creature of the state * * *." 260

Both the *Meyer* and the *Pierce* cases recognized, however, the right of the state to prescribe a minimum curriculum, and that right has been upheld against the claim of a parent who sought to send his child to a sectarian school where the secular minimum was not taught.[113] The parent's right to control and direct his child has also been held subject to the state's right to require military training at a state university,[114] and to intervene in the interest of health to require that 261

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[112] 268 U. S. 510.

[113] People v. Donner, 199 Misc. 643, aff'd 278 App. Div. 705, aff'd 302 N. Y. 857, app. dism'd 342 U. S. 884. Parents may, however, educate their children at home if curriculum and teaching standards are met. People v. Turner, 277 App. Div. 317.

[114] Hamilton v. Regents, *supra*, n. 98; see also West Virginia State Board of Education v. Barnette, *supra*, n. 98, at 632.

the child be given proper medical attendance,[115] to compel vaccination,[116] or to prohibit the use of young children in evangelical work in violation of the child labor law.[117]

The rule thus to be adduced is that the parent has primary control over his child but that the stat if it acts for the general welfare or the welfare of the child and there is a substantial nexus between the action required and the end sought to be attained, may exercise a paramount control. That is to say, the parent's primary
263 right of control over his child remains subject to the exercise of the state's police power in a proper case.

Investigation of the decisions relating to religious freedom shows that the same rule applies: freedom of religion is a preferred[118] but not an absolute right, upon which the state may impose restrictions if the restrictions are reasonable in relation to the gravity of the danger against which they are intended to protect. Thus the Court in ruling on rights to church lands in Virginia after the revolution, held that the Virginia Constitution
264 did not require abolition of all religious corporations and that "the free exercise of religion cannot be justly deemed to be restrained by aiding with equal attention the votaries of every sect to perform their own religious duties."[119] Again,

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[115] People v. Pierson, 176 N. Y. 201, cited with approval in Prince v. Massachusetts, *supra*, n. 18, at 167.

[116] Jacobson v. Massachusetts, 197 U. S. 11.

[117] Prince v. Massachusetts, *supra*, n. 18.

[118] "Preferred" in the sense that it is guaranteed by the Bill of Rights. The decisions conflict concerning whether freedom of religion is preferred over other constitutionally guaranteed rights.

[119] Terrett v. Taylor, 9 Cranch 43, 49. The decision rendered in 1815 by Justice Story, is apparently the first touching on religious freedom.

in *Watson* v. *Jones*,[120] in holding legal tribunals bound by decisions of church authority on matters of church law and discipline, the Court recognized "the full and free right to entertain any religious belief, to practice any religious principle, and to teach any religious doctrine which does not violate the laws of morality and property, and which does not infringe personal rights." The proviso was applied in both *Reynolds* v. *United States*[121] and *Davis* v. *Beason*[122] to hold that polygamy is a crime despite religious belief to the contrary. In the latter case in explaining 266
the scope and limitation of First Amendment rights, the court said:

> "The First Amendment to the Constitution, in declaring that Congress shall make no law respecting the establishment of religion, or forbidding the free exercise thereof, was intended to allow everyone under the jurisdiction of the United States to entertain such notions respecting his relations to his Maker and the duties they impose as may be approved by his judgment and conscience, and 267
> to exhibit his sentiments in such form of worship as he may think proper, not injurious to the equal rights of others, and to prohibit legislation for the support of any religious tenets, or the modes of worship of any sect. The oppressive measures adopted, and the cruelties and punishments inflicted by the governments of Europe for many ages, to compel parties to conform in their religious beliefs

[120] 13 Wall 679, 728.
[121] *Supra*, n. 54.
[122] 133 U. S. 333.

and modes of worship to the views of the most numerous sect, and the folly of attempting in that way to control the mental operations of persons and enforce an outward conformity to a prescribed standard, led to the adoption of the Amendment in question. It was never intended or supposed that the Amendment could be invoked as a protection against legislation for the punishment of acts inimical to the peace, good order and morals of society. With man's relations to his Maker and the obligations he may think they impose, and the manner in which an expression shall be made by him of his belief on those subjects, no interference can be permitted, provided always the laws of society, designed to secure its peace and prosperity, and the morals of its people, are not interfered with. However free the exercise of religion may be, it must be subordinate to the criminal laws of the country, passed with reference to actions regarded by general consent as properly the subjects of punitive legislation".[123]

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270 The right thus recognized to adhere to and publicly to express religious beliefs extends to evangelization in the public streets,[124] in the sale of religious tracts,[125] and in public parks,[126] as

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[123] *Ibid.*, 342-343.

[124] Cantwell v. Connecticut, *supra*, n. 98; Jamison v. Texas, 318 U. S. 413; Largent v. Texas, 318 U. S. 418; see Kunz v. New York, 340 U. S. 290.

[125] Jones v. Opelika, 319 U. S. 103; Murdock v. Pennsylvania, *supra*, n. 98; Follett v. Town of McCormick, 321 U. S. 573.

[126] Fowler v. Rhode Island, supra, n. 40; Niemotko v. Maryland, 340 U. S. 268. The latter decision was based on equal protection rather than religious freedom, however.

well as in a company town.[127] In the field of education, it permits the Congress to expend Indian trust funds for the religious education of the Indians since otherwise their freedom of religion would be violated,[128] permits a Jehovah's Witness child to attend school despite a refusal to salute the flag,[129] permits a parent to demand the release of his child for a religious holiday,[130] or, at least, is not violated when release is granted for such holidays.[131] It also is not violated when the Congress recognizes the religious scruples of conscientious objectors by exempting them from the 272
draft,[132] although clearly such an exemption is a matter of grace and not of constitutional requirement.[133] It does not, however, even on religious grounds, permit withdrawal of children from school in the face of a statute requiring attendance until age 16,[134] nor, as we have seen, sanction violation of a child labor ordinance, the refusal to give instruction in the minimum curriculum re-

[127] Marsh v. Alabama, 326 U. S. 501.

[128] Quick Bear v. Leupp, 210 U. S. 50.

[129] West Virginia State Board of Education v. Barnette, 273
supra, n. 98. The decision overruled Minersville District v. Gobitis, *supra*, n. 98, which had held the governmental interest in maintaining national unity paramount.

[130] Zorach v. Clauson, supra, n. 19, at p. 173. Compare, however, Ferriter v. Tyler, 48 Vt. 444 holding that a Catholic child could be expelled for refusal to attend on Corpus Christi Day, and Commonwealth v. Bey, 166 Pa. Sup. 136, upholding the conviction for violation of the compulsory education law of a Mohammedan parent who kept his child out of school on Friday.

[131] Zorach v. Clauson, *supra*, n. 17, at p. 313.

[132] Selective Draft Law Cases, 245 U. S. 366.

[133] United States v. Macintosh, 283 U. S. 605, 623.

[134] Commonwealth v. Beiler, 168 Pa. Sup. 462.

quired by statute, nor refusal to take a course in military science at a state university.

If we turn our attention to the "establishment" clause, we find that the Court has held that there is no constitutional impediment to Congressional repeal of a charter granted under territorial law to the Mormon Church,[135] that the draft exemption of conscientious objectors is not the making of a law respecting an establishment,[136] and that the Amendment does not proscribe a contract between the Government of the District of Columbia and a
275 hospital run by an order of Catholic Sisters but incorporated as a separate entity.[137] Its most important decisions on the subject, however, were in the field of education,[138] in *Everson* v. *Board of Education*,[139] *Illinois ex rel. McCollum* v. *Board of Education*[140] and *Zorach* v. *Clauson*.[141]

The *Everson* case held that a statute authorizing reimbursement of parents for expenditures for bus transportation of their children to school, including Catholic parochial schools, did not constitute an establishment, its purpose being merely to provide safe transportation and thus protect
276 the general welfare. The decision included the now famous dictum that:

> "The 'establishment of religion' clause of the First Amendment means at least this:

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[135] Mormon Church v. United States, 136 U. S. 1.

[136] Selective Draft Law Cases, *supra*, n. 132.

[137] Bradfield v. Roberts, 175 U. S. 291.

[138] Hamilton v. Regents, *supra*, n. 98, concerned education and includes a dictum by Mr. Justice Cardozo that requiring military instruction at a state university does not violate the "establishment" clause.

[139] *Supra*, n. 92.

[140] *Supra*, n. 20.

[141] *Supra*, n. 17.

> Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. No tax in any amount, large or small, can be levied to support any religious 278
> activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and vice versa. In the words of Jefferson, the clause against establishment of religion by law was intended to erect 'a wall of separation between Church and State'." [142]

The *McCollum* case relied upon that dictum to in- 279
validate a released time system under which pupils whose parents signed permission cards were given thirty or forty-five minute periods of religious instruction on public school premises during school hours by teachers employed by religious organizations though subject to the approval of the public school superintendent. Non-participating chil-

[142] *Supra*, n. 92, at pp. 15-16. It had earlier been decided in Cochran v. Louisiana State Board of Education, 281 U. S. 370, that a state could make secular textbooks available to both public and parochial schools, but the First Amendment issue was not raised in that case.

dren attended a regular class or a study hall during the released time period. The majority opinion refused to accept the argument that the First Amendment forbids only preference of one religion over another, not impartial governmental assistance to all, and held that since public buildings were being used for religious instruction and the state's compulsory education system was used to help provide pupils for the program of instruction carried on by the separate religious sects, the pro-
281 gram was unconstitutional. A concurring opinion, written by Mr. Justice Frankfurter, reviewed the history of education in colonial times and through the period in which the Fourteenth Amendment was adopted and concluded that separation of the state from the teaching of religion was the accepted principle, and that, by permitting such teaching on school time and property, pressure was put upon children to attend, and a feeling of separation was engendered. Only Justice Reed dissented.

The final decision, *Zorach v. Clauson*, was ren-
282 dered four years later. During the intervening period a storm raged in legal and educational fields over the *McCollum* ruling.[13] The *Zorach* decision upheld the New York released time system. The court held that the First Amendment does not require separation in every respect, the question in each case being one of degree. It emphasized the religious nature of our people and said that to refuse to accommodate the public service to their spiritual needs would be to prefer non-believers over believers. It pointed out that,

[13] See Mr. Justice Black's dissent, 343 U. S. at 317 and his notes 1 and 2.

since the children were released for instruction outside the school, neither religious instruction nor expenditure of public funds was involved and added that there was no evidence that coercion was in fact being used to force or persuade students to take religious instruction. Holding that

> "government may not finance religious groups nor undertake religious instruction nor blend secular and sectarian education nor use secular institutions to force one or some religion on any person. * * * It may not coerce anyone 284
> to attend church, to observe a religious holiday, or to take religious instruction",[144]

the Court concluded that a system whereby the public schools do no more than accommodate schedules to a program of outside religious instruction does not violate the Amendment.

The *Zorach* decision constitutes a retreat from both *Everson* and *McCollum* where *Everson's* broad dictum, reaffirmed in *McCollum*, outlawed aid to all religions, *Zorach* recognized that government can, without violation, accommodate all re- 285
ligions; where *McCollum* invalidated an alliance between religion and the compulsory education system, *Zorach* upheld the same alliance, for the same purpose, though in a different place. The *Everson* holding, that the expenditure of tax funds for a general welfare purpose was not invalidated because religious groups also benefited, was extended by *Zorach* to validate minimal [145] use of the

[144] 343 U. S. at 314.

[145] The Court noted both that the cards were printed by the religious organizations (p. 309) and that the school's truancy system was not used to enforce attendance (p. 311, n. 6).

tax supported school system for a religious purpose, as an accommodation of the spiritual needs of our people. The *McCollum* holding, that religious instruction as a part of a compulsory school system is unconstitutional without regard to whether actual compulsion operates[146] was adhered to, but the fact situation in *Zorach* was held sufficiently different in degree to warrant sanction of the accommodation. This would appear to be the reverse side of the "free exercise" coin: "establishment" prohibits any compulsion in matters
287 of religion that operates directly on the individual, but prohibits indirect compulsion (as through the use of general tax funds for a religious purpose) only if the nexus between government and religion thus produced is too close. The democratic nature of our government precludes the imposition of sanctions in the field of religion; the religious nature of the governed sanctions the inclusion of religion in the processes of democratic life; the dividing line between permitted accommodation and proscribed compulsion is a matter of degree, to be determined anew in each new fact situation.

288 Despite an apparent contradiction in terms, the First Amendment's "establishment" and "free exercise" clauses clearly protect the nonbeliever as well as the believer in God. This is

[146] The Court found it unnecessary, in view of its conclusion, to consider whether actual pressure existed. 333 U. S. 203, 207, n. 1. The trial court had found as a fact that it did not, SUTHERLAND, *supra*, n. 100, 62 Harv. L. R. 1306, 1313, citing McCollum Record, p. 69. The court did not emphasize the sectarian nature of the instruction, though Justice Douglas, in AN ALMANAC OF LIBERTY (1954), 261, calls the use of public school rooms and machinery for such instruction "the fatal feature".

borne out by decisions of the Supreme Court, by utterances of the Founding Fathers and by a provision of the Constitution itself. Thus the *Everson* decision states that the First Amendment "requires the state to be a neutral in its relations with groups of religious believers and non-believers",[147] the *McCollum* ruling protected the rights of an atheist, and the *Zorach* decision, by refusing to prefer "those who believe in no religion over those who do believe",[148] recognized but refused priority to the non-believer's right. 290
The principle thus stated is implicit in the provision of Article VI of the United States Constitution that "no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States". It also was the point of view of Jefferson and Madison. Thus, Jefferson stated in his Republican Notes on Religion[149] that "it does me no injury for my neighbor to say there are twenty Gods, or no God" and Madison incorporated in the fourth point of his Memorial and Remonstrance the statement that: 291

[147] 330 U. S. at p. 18.

[148] 343 U. S. at 314. The principle was also recognized in the Gobitis case, *supra*, n. 98, at p. 593, in Plywacki v. United States, 205 F. 2d 423, which reversed, on the government's confession of error, the District Court's refusal to naturalize an atheist, in Lewis v. Board of Education, 157 Misc. 520, 526, mod. 247 App. Div. 106, app. dism'd 276 N. Y. 490 and in Matter of Lewis v. Allen, 5 Misc. 2d 68.

[149] *Supra*, n. 93. See also his Notes on Locke, reprinted in THE PAPERS OF THOMAS JEFFERSON (Boyd Ed.) Vol. I p. 548.

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> "Whilst we assert for ourselves a freedom to embrace, to profess and to observe the Religion which we believe to be of divine origin, we cannot deny an equal freedom to those whose minds have not yet yielded to the evidence which has convinced us."

Indeed, the only suggestions to the contrary are the statement, in the course of debate on the First Amendment, by Representative Huntington, that he hoped that the Amendment would be made in
293 such a way as to secure rights of conscience "but not to patronize those who professed no religion at all",[150] and a concurring opinion stating that freedom "of" religion does not mean freedom "from" religion.[151] The opinion's apothegm is true only in a most limited sense. Every individual has a constitutional right personally to be free from religion, but that right is a shield, not a sword, and may not be used to compel others to adopt the same attitude. Mr. Huntington's remark may be construed as suggesting merely that non-believers are not to be preferred over
294 believers. To the extent that it may be read as suggesting that non-believers have any lesser rights, it is inconsistent with the views of Madison and Jefferson referred to above and with the fact that, at the time that it was uttered, less than twenty percent of the population of New England (the best churched section of the colonies)

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[150] Annals of Congress, Vol. I, Col. 731; see also STOKES, *supra*, n. 35, Vol. I, p. 543.

[151] Gordon v. Board of Education, 178 P. 2d 488 (Cal. Dist. Crt. App.), review denied by the California Supreme Court, see 78 Cal. App. 2d 464; see PFEFFER, *supra*, n. 71, at p. 341.

had any formal connection with organized religion.[152] Such an isolated statement, nowhere shown to have been brought to the attention of those who ratified the Amendment, cannot be considered the "sense of the nation".

The principles of decisional law so far considered have been stated in federal cases concerned with the United States Constitution. Except for the few incidental references to prayer hereinbefore noted, however, nothing in those cases has related to prayer in the schools 296
or the closely kindred subject of the Bible in the schools.[153] Before attempting to apply the rules so far adduced to the fact situation of the present case, state decisions relating to prayer, the Bible and baccalaureate services must be considered.

The use of prayer in the schools either separately or together with the Bible has been upheld

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[152] SWEET, RELIGION IN COLONIAL AMERICA (1942), p. 335; see also STOKES, *supra*, n. 35, Vol. I, p. 229 which cites an article by Sweet giving the overall figure as one in eight, and another by Davis putting the ratio at one in 297
twenty to twenty-five; and COBB, THE RISE OF RELIGIOUS LIBERTY IN AMERICA (1902), 16.

[153] Doremus v. Board of Education, *supra*, n. 20, dismissed for want of standing an appeal from a judgment upholding reading of the Bible in New Jersey schools; Tudor v. Board of Education, 348 U. S. 816, denied *certiorari* with respect to a New Jersey judgment holding unconstitutional the distribution of Gideon Bibles through the schools; Washington *ex rel.* Clithero v. Showalter, 284 U. S. 573, dismissed appeal with respect to a judgment holding that the schools could not be required to hold opening Bible reading exercises. The Bible question under a compulsory statute is now before a three-judge federal court in Philadelphia for decision, in Schempp v. School District of Abington Township, New York Times, March 13, 1959, p. 14, Col. 2.

in ten [154] and struck down in seven [155] state decisions. Of the cases concerned solely with the reading of the Bible, nine [156] have upheld and two [157] have struck down Bible reading as a devotional exercise.[158] It has also been held that

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[154] Spiller v. Inhabitants of Woburn, *supra*, n. 45; Moore v. Monroe, *supra*, n. 45; Billard v. Board of Education, 76 Pac. 422 (Kan.); Church v. Bullock, 109 S. W. 115 (Tex.); Hackett v. Brooksville Graded School District, *supra*, n. 45; Knowlton v. Baumhover, 166 N. W. 202
299 (Iowa); Wilkerson v. City of Rome, 110 S. E. 895 (Ga.); Doremus v. Board of Education, 75 Atl. 2d 880 (N. J.), app. dism'd 342 U. S. 429; Commonwealth v. Renfrew, 126 N. E. 2d 109 (Mass.); Carden v. Bland, 288 S. W. 2d 718 (Tenn.). Cases such as North v. Board of Trustees, 27 N. E. 54 (Ill.) upholding compulsory chapel at a state university are not included since a college education is not compulsory.

[155] State *ex rel.* Freeman v. Scheve; People *ex rel.* Ring v. Board of Education; Herold v. Parish Board, all *supra*, n. 45; State *ex rel.* Conway v. District Board, 156 N. W. 477 (Wisc.) (dicta); State v. Weedman, *supra*, n. 45; 1909-1910 Op. Atty. Gen.—Wash. 135; 25 Cal. Ops. Atty. Gen. 316 (1955).

[156] Donohoe v. Richards, *supra*, n. 64; Hart v. School
300 District, 2 Lanc. L. R. 346; Nessle v. Hum, 1 Ohio N. P. 140; Stevenson v. Hanyon, 4 Pa. Dist. Rep. 395; Curran v. White, 22 Pa. Co. Crt. Rep. 201; Pfeiffer v. Board of Education, 77 N. W. 250 (Mich.); Kaplan v. Independent School District, 214 N. W. 18 (Minn.); People *ex rel.* Vollmar v. Stanley, 255 Pac. 610 (Colo.); Lewis v. Board of Education, *supra*, n. 148.

[157] State *ex rel.* Weiss v. District Board, 44 N. W. 967 (Wisc.); State *ex rel.* Dearle v. Frazier, 173 Pac. 35 (Wash.).

[158] Use of the Bible generally for other than sectarian instruction was permitted in State *ex rel.* Freeman v. Scheve, *supra*, n. 45, and People *ex rel.* Vollmar v. Stanley, *supra*, n. 156, and its use as a library book was sanctioned in Evans v. Selma Union High School Dist., 222 Pac. 801 (Cal.).

a school board may not be required to hold Bible reading exercises,[159] that school baccalaureate services and graduation exercises may be held in a church,[160] that the school system may not be used as a means of distributing religious pamphlets or Gideon Bibles,[161] and that a Board of Education may not display in the classrooms of its schools a plaque purporting to set forth the Ten Commandments.[162] Most of the above decisions have been made under state constitutional provisions prohibiting sectarian teaching. They conflict concerning whether the Bible or the Lord's Prayer 302
is sectarian. Many of the cases upholding such practice have pointed to the fact that the regulation involved did not make it compulsory;[163] but regulations permissive in terms have been struck

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[159] Board of Education, City of Cincinnati v. Minor, 23 Ohio 211; State *ex rel.* Clithero v. Showalter, 293 Pac. 1000 (Wash.), appeal dismissed 284 U. S. 573.

[160] State *ex rel.* Conway v. District Board, *supra*, n. 155; Miller v. Cooper, 244 Pac. 2d 520; compare Matter of Dargin, *supra*, n. 47.

[161] Miller v. Cooper, *supra*, n. 160; Tudor v. Board of Education, 100 Atl. 2d 857 (N. J.) cert. den. 348 U. S. 816. 303

[162] Matter of Behman, 78 N. Y. St. Dept. Rep. 10. The version used was drawn from all but would have conformed to none of the versions used by the different faiths.

[163] Moore v. Monroe, Hackett v. Brooksville Graded School Dist., both *supra*, n. 45; Church v. Bullock, Wilkerson v. City of Rome, both *supra*, n. 154; Hart v. School District; Pfeiffer v. Board of Education; People *ex rel.* Vollmar v. Stanley; Kaplan v. Independent School Dist., all *supra*, n. 156.

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down because of the compulsion and discrimination involved in having to ask to be excused.[164]

Most of the decisions make no reference to the First and Fourteenth Amendments, a few make passing reference to them but rest decision primarily on state provisions,[165] only four discuss the effect of the Amendments.[166] *People* v. *Stanley* held that under the Fourteenth Amendment children cannot be compelled, against their parents' wishes, to take instruction not essential to good citizenship and that since the morality of the Bible
305 could be taught by other methods, Bible reading was not essential and, therefore, could not be made compulsory. It then discussed, as a state constitutional question "with which the United States Constitution has nothing to do," whether

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[164] State *ex rel.* Weiss v. District Board, *supra*, n. 157; People *ex rel.* Ring v. Board of Education; Herold v. Parish Board, both *supra*, n. 45; Tudor v. Board of Education, *supra*, n. 161; see Knowlton v. Baumhover, *supra*, n. 154.

[165] Commonwealth v. Renfrew, *supra*, n. 154, contained a footnote reference to McCollum, *supra*, n. 20, and Zorach,
306 *supra*, n. 17; Carden v. Bland, *supra*, n. 154, found Everson *supra*, n. 92, and McCollum irreconcilable and based the decision primarily on State provisions; Miller v. Cooper, *supra*, n. 160, referred to McCollum, Doremus, *supra*, n. 154, and Zorach, but said they were not helpful in reaching a decision; Lewis v. Board of Education, *supra*, n. 148, p. 528, said the Greater New York Charter provision in question, section 1151, could not violate the Federal Constitution because it contained the proviso that nothing herein "shall be so construed as to violate the rights of conscience, as secured by the constitution of this State and of the United States."

[166] People *ex rel.* Vollmar v. Stanley, *supra*, n. 150; Doremus v. Board of Education, *supra*, n. 20; Tudor v. Board of Education, *supra*, n. 161, and a 1955 California Attorney General's Opinion, *supra*, n. 46.

Bible reading had to be excluded altogether. It concluded that non-compulsory reading of the Bible without comment was not sectarian, though the conclusion might be different if it were shown that sectarian sections of the Bible were read, and issued a writ requiring revocation of the order of compulsory attendance. *Doremus* v. *Board of Education* held that under the applicable statute the practice of reading the Bible and reciting the Lord's Prayer was permissive and not compulsive; that the sense of the First Amendment does not prohibit the recognition of God; and that the 308
practice did not constitute sectarian instruction or worship or set up religious instruction or religious worship in aid of one or more religions or constitute the establishment of religion or prohibit the free exercise of religion. *Tudor* v. *Board of Education*, decided by the same court, struck down the distribution of Gideon Bibles through the schools. The decision reviewed the history of the adoption of the First Amendment, and the religious motivation of the colonists, and held that the distribution of the New Testament constituted a religious preference in violation of the First 309
Amendment. It distinguished the *Doremus* ruling and held the Gideon Bible to be a sectarian book. It further held that the practice involved could not be viewed as merely an accommodation, particularly in view of the testimony of psychiatrists that the effect of distribution under the authority of the school would be to create a subtle pressure on the child and to create tensions among religious groups. Finally, the Attorney General of the State of California has held that the First Amendment prohibits recitation of a prayer identical

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with the prayer involved in the instant case except that in place of the word "parents" it substituted the word "home". His decision reviewed the federal cases and concluded that a public school teacher may not be required to participate in such a prayer exercise [167] and that, in any event, the use of the prayer would be unconstitutional as a violation of the rights of the children of atheist and agnostic parents. To require the children to participate in prayers contrary to the belief of their parents would, he held, be a material en-
311 croachment on the separation of church and state, and the right to be absent he considered an inadequate protection from the very real, though subtle, pressure which the endorsement of school and teacher would produce upon the child.

How do the above decisions and the principles to be drawn from them affect the instant case? The *Zorach* case holds that the Constitution does not require separation in every and all respects and, as we have seen, constitutional history confirms a tradition of prayer, including prayer in the schools. Even without the constitutional his-
312 tory, some form of prayer would appear to fall within the realm of permissible accommodation. Despite the Board's "spiritual heritage" argument, the prayer under consideration cannot be deemed religious instruction. It is recited during opening exercises rather than as a part of any instructional period. It is phrased in traditional prayer form rather than in any form normal for instructional materials. Essentially, it is devotional and, as such, is designed to be repeated

[167] A question not involved in the instant case since no teacher has objected.

daily, without change, over a twelve-year school course. Twenty-two words in length, and thus taking substantially less than one minute to recite and a good deal less time for recitation than does the legislative prayer deemed by *Zorach* to be within permissible constitutional degree, the instant prayer, at least when its recitation is limited to daily exercises at the opening of school, must be classified as outside *McCollum's* proscription of religious instruction and within *Zorach's* sanction as an accommodation.[168]

As *Zorach* recognizes, however, the prayer exercise would nonetheless be objectionable if there were direct compulsion. The Board's resolution of July 8, 1958, is framed in mandatory terms. While the answering affidavit states that direction has been given that no child shall be coerced or in any manner persuaded to participate, there is no indication that either the resolution or the direction has been brought to the attention of either the parents or the children. This is not a situation, such as pertained in the *Zorach* case, where prior parental consent has been obtained. In view of that fact and in view of the fact that a school child cannot be expected to understand that a resolution phrased in mandatory terms

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[168] Compare Baer v. Kolmorgen, *supra*, n. 19, which approved as an accommodation the display of a crèche on the school lawn during Christmas recess, Lewis v. Allen, *supra*, n. 148, which refused to order discontinuance of the words "under God" in the pledge of allegiance, and KONVITZ, FUNDAMENTAL LIBERTIES OF A FREE PEOPLE (1957), 75. For both policy and legal arguments pro and con concerning the Regent's prayer, see PFEFFER, *supra*, n. 71, at p. 304.

may be violated with impunity [169] or that such a child, not advised of his right to do so, will not normally be sufficiently aggressive to claim his constitutional privilege not to participate,[170] the Court holds that the resolution of July 8, 1958, in its present form, is objectionable. The matter will, therefore, be remanded to the Board for modification of its resolution to establish a procedure whereby the parents of each child are advised of the adoption of the resolution calling for the saying of prayer, of the wording of the
317 prayer and of the procedure to be followed when it is said and requested to indicate whether the child shall or shall not participate in the exercise.[171]

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[169] Indeed it can hardly be argued, in connection with a campaign to teach moral values, including "respect for lawful authority and obedience to law" (Regents' Statement, *supra*, n. 5), that the mere fact that no punishment is provided means that there is no compulsion to an order from the School Board, phrased in mandatory terms. Jefferson's letter to Miller, *supra*, n. 42, accords with this
318 view.

[170] Cf. Justice Frankfurter's McCollum opinion, 333 U. S. at 227 (*supra*, n. 20). "The law of imitation operates, and non-conformity is not an outstanding characteristic of children."

[171] While some slight cost will be involved in obtaining such an expression from parents, this alone would not give petitioners standing to sue. Doremus v. Board of Education, *supra*, n. 20, and, despite Zorach's reservation of the point, is not considered of a sufficient degree of importance to invalidate the practice. See People *ex rel.* Lewis v. Graves, 245 N. Y. 195. Particularly is this so since, as we shall see, such an expression is also necessary to protect "free exercise" rights.

Since the matter is, therefore, to be remanded to the Board, it is not necessary to hear petitioner's evidence on the subject of coercion. In any event, to the extent that petitioners seek to rely on the pressure resulting from the school's apparent sanction of prayer and from the necessity of applying for release from the exercise, as distinct from overt acts of the teachers or other school authorities, the evidence would not be material. To recognize "subtle pressures" as compulsion under the Amendment is to stray far afield from the oppressions the Amendment was designed to prevent;[172] to raise the psychology of dissent, which produces pressure on every dissenter, to 320

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[172] Jefferson's Notes on Virginia, *supra*, n. 93, refers to "coercion" and innocent people, "burnt, tortured, fined and imprisoned" and his Act for Establishing Religious Freedom enacted that "no man shall be compelled to frequent or support any religious worship, place or ministry whatsoever, nor shall be enforced, restrained, molested or burthened in his body or goods, nor shall otherwise suffer on account of his religious opinions or belief * * *"; Madison's Memorial, to "force and violence", 321
"torrents of blood", "attempts to enforce by legal sanctions"; Roger Williams' BLOUDY TENENT, OF PERSECUTION FOR CAUSE OF CONSCIENCE (1644) was directed against persecution and blood spilt in the attempt to enforce uniformity of religion; Locke's A LETTER CONCERNING TOLERATION (1689) was concerned that "no violence nor injury is to be offered" (Crowder Ed., p. 30). Note also the reference in the quotation from Davis v. Beason, *supra*, n. 122, to "oppressive measures adopted, and the cruelties and punishments inflicted."

322 *Opinion by Meyer, J.*

the level of governmental force;[17a] and to subordinate the spiritual needs of believers to the psychological needs of non-believers. The equality of treatment which the Amendment was designed to produce does not require, indeed proscribes, so doing.

This is not to say that the rights accorded petitioners and their children under the "free exercise" clause do not mandate safeguards against such embarrassments and pressures. It is enough on this score, however, that regulations, such as
323 were adopted by New York City's Board of Education in connection with its released time program, be adopted, making clear that neither teachers nor any other school authority may comment on participation or non-participation in the exercise nor suggest or require that any posture or language be used or dress be worn or be not used or not worn. Non-participation may take the form either of remaining silent during the exercise, or if the parent or child so desires, of being

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[17a] Mr. Justice Frankfurter's McCollum opinion, *supra*,
324 n. 20, p. 277, which concluded that "the result is an obvious pressure upon children to attend" should be compared with Mr. Justice Jackson's opinion in the same case (p. 233): "• • • it may be doubted whether the Constitution which, of course, protects the right to dissent, can be construed also to protect one from the embarrassment that always attends nonconformity, whether in religion, politics, behavior or dress." Jefferson's reference in his letter to Miller, *supra*, n. 42, to "some degree of proscription, perhaps in public opinion" in the issuance of a Thanksgiving proclamation is also to be compared with the Supreme Court's recognition in Richardson v. Goddard, 23 How. 28, that such a proclamation involved no legal compulsion. For Professor Sutherland the problem is "when embarrassment reaches the point of outrage", American Council of Education Report, *supra*, n. 100, at p. 58, 62.

excused entirely from the exercise.[174] Such regulations must also make provision for those non-participants who are to be excused from the prayer exercise.[175] The exact provision to be made is a matter for decision by the Board, rather than the Court, within the framework of constitutional requirements. Within that framework would fall a provision that prayer participants proceed to a common assembly while non-participants attend other rooms, or that non-participants be permitted to arrive at school a few minutes late or to attend separate opening exercises, or any other method 326
which treats with equality both participants and non-participants.[176]

[174] The Brief of *Amicus Curiae* recognizes this. It states (p. 13): "Schools are expected and, on appeal to the Commissioner of Education under Section 310 of the Education Law, in a proper case, would be ordered to accommodate each child according to his conscience and his parents' wishes, by either allowing him to leave the room, or to remain silent throughout the ceremony, or a proper part thereof, as the case may be." The appeal procedure, however, is not sufficient under a law phrased in mandatory terms. There must be regulations setting 327
forth the rights of parent and child before compulsion has an opportunity to operate.

[175] While the result is separation, it is separation for the purpose of according to each the right to follow his own religious prepossessions, and in furtherance of spiritual needs which may constitutionally be accommodated. For these reasons, Brown v. Board of Education, *supra*, n. 58, p. 495, holding racially segregated educational facilities "inherently unequal" is distinguishable.

[176] Of course, permitting attendance at prayer outside school with excusal of the lateness of those so doing would fall squarely within the Zorach case, and the Superintendent's plan for having prayer said a few minutes before 9:00 A. M. would also be acceptable. Of interest, too, is Canon Stokes suggestion, Vol. III, p. 684, of a period of silent prayer, a practice which he notes (Vol. I, p. liv) the United Nations has adopted for its meetings.

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While for the reasons stated, the matter is to be remanded to the Board, the Court should also consider for the Board's guidance on remand the questions raised by petitioners with respect to divisiveness, sectarianism and the New York State Constitution. One of the purposes, it has been said, for adoption of the First Amendment was "to keep bitter religious controversy out of public life by denying to every denomination any advantage from getting control of public policy or the public purse."[177] Division over compulsory
329 unification through public school programs was
3 referred to in the *Barnette* decision[178] and the vital necessity to keep divisive forces out of the schools was argued in the *McCollum* concurring opinion[179] in considering whether the practices involved could be coerced. But what was involved in each situation was compulsion;[180] divisiveness

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[177] Mr. Justice Jackson, dissenting, in Everson, 330 U. S. at 27, *supra*, n. 92.

[178] 319 U. S. at 641, *supra*, n. 98.

330 [179] 333 U. S. at 231, *supra*, n. 20. See also Tudor v. Board of Education, *supra*, n. 161.

[180] Thus Madison's eleventh point in the Memorial inveighed against the bill, "Because, it will destroy that moderation and harmony which the forebearance of our laws to intermeddle with Religion, has produced amongst its several sects. Torrents of blood have been spilt in the old world, by vain attempts of the secular arm to extinguish Religious discord, by proscribing all difference in Religious opinions."

and consciousness of religious differences have not been raised to the level of constitutional absolutes.[181] At most, division may be considered as one of many criteria to be used in determining whether a particular practice is within or without the Constitution. With respect to prayer, the constitutional history above reviewed shows a widespread tradition of prayer. And the existence of religious differences is one of the facts of life of which school children are every day made aware by absences for religious holidays, differences in clothing, in dietary habits and in other observances.[182] Religious tensions are part of everyday living and competition among creeds

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[181] Judge Desmond considered divisiveness and coercion "predilections, not questions of law", Zorach v. Clauson, *supra*, n. 19, at p. 177. In any event petitioner's offered proof of division in this school district over this prayer could not be material, for the ultimate conclusion would then have to be that the constitution permits in a community in which divisiveness cannot be shown what it prohibits where there is a showing of divisiveness. There is no such constitutional principle.

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[182] The reference in the Barnette case, *supra*, n. 98, to division over requiring flag salute may be compared with the Report on the Religion and Education Conference for Connecticut, Massachusetts and Rhode Island issued July 27, 1959 by the National Citizens Council for Better Schools. That report lists as a factor which gives rise to "deep tensions" that "Jehovah's Witnesses refuse to allow their children to salute" (p. 3).

is advantageous.[183] "Our heterogeneous society with its different religious groups demands the development of respect for differing points of view and for the right of others to believe differently."[184] The genius of the American experiment has been not a lack of difference in point of view, but absolute equality in matters of thought and belief despite all differences.

Petitioners contend, nonetheless, that there is not equality of treatment because the prayer is sectarian. Without analyzing in detail the meaning of the word "sectarian" as construed by the cases discussed above, it may be stated that the instant prayer which invokes "Almighty God" acknowledges "dependence" upon Him and "asks

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[183] Jefferson's Notes, *supra*, n. 93, stated "Difference of opinion is advantageous in religion. The several sects perform the office of a *censor morum* over each other". Hunt, *James Madison and Religious Liberty*, 1 Ann. Rep. Am. Hist. Assn. (1901), 165, 170, records Madison's fondness for repeating Voltaire's aphorism that: "If one religion only were allowed in England, the Government would possibly become arbitrary; if there were two, the people would cut each other's throats; but as there are such a multitude, they all live happy and in peace", and Madison's view that the security for religious rights was the multiplicity of sects. See also PFEFFER, CREEDS IN COMPETITION (1958), particularly Chapter 9, and the New York Times, April 3, 1959, p. 19, Col. 5, reporting agreement among the speakers at the Annual Meeting of the Associated Church Press "that religious tension was a healthy adjunct to a democratic society."

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[184] The quotation is from the conclusion of the Report on the Religion and Education Conference, *supra*, n. 182, at p. 11, which also stated that: "The conference groups agreed that children should be taught a basic respect for others and that learning an attitude of tolerance should be a part of their formal religious as well as secular training."

blessings" cannot be considered sectarian in the sense that it prefers any particular sect. The fact that the prayer and the manner of its saying may not conform to all of the tenets of the Jewish, Unitarian and Ethical Culture groups, or of any other group, does not mean that the prayer is sectarian. Nor can it be said in any true sense that the granting of legislative permission to say a prayer as an opening exercise in a school is a preference of believers over non-believers when the saying of the prayer is not made compulsory. To put it shortly, since each is free to follow his 338
own predeliction with respect to prayer, to participate in a prayer exercise or to refuse to do so, the exercise cannot be deemed preferential.

For the same reason, that is, that the saying of the prayer is not made compulsory, the particular form of prayer adopted by the respondent Board in the instant case cannot be considered to be invalid as the prescription of a mode of worship. If it be admitted that the Board may constitutionally permit the saying of a prayer as an opening exercise in a school, then it must either adopt a form of prayer or else leave to the 339
discretion of the teacher or a student, if students are used to lead the exercise, the determination of what prayer is to be said. The latter procedure could, of course result in the use in the schools of prayers identifiable as those of a particular sect, therefore preferential, and, therefore, prohibited. In order to prevent such a possibility and to seek the widest possible acceptance, the Board may adopt a form of prayer so long as it does not adopt the prayer of any sect or a prayer sectarian in concept and does not make recitation of the adopted form compulsory.

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This is not to say, however, that the Board may be compelled to permit the saying of a prayer in the schools. The cases discussed above make clear that though the "free exercise" clause allows wide latitude to the individual in public expression of his belief and public demonstration of his worship, the freedom is not absolute. No sacred cow may impede the flow of traffic so necessary to the general welfare; no belief in polygamy, save the believer from prosecution. The state may determine the time and place, and within the limits sug-
341 gested above, the manner of the exercise of such freedom, when it acts to protect its own legitimate interests or that of other citizens. The state may, therefore, in determining the curriculum of its schools, exclude any form of devotional exercise. It follows that the Board's affirmative defense that petitioners in seeking to interfere with the saying of the prayer by the children of others are acting in violation of the Federal and State constitutions must be dismissed.

Petitioners' final contention is that the saying of the prayer violates Article 1, Section 3 of the
342 State Constitution. That section reads as follows:

> "The free exercise and enjoyment of religious profession and worship, without discrimination or preference, shall forever be allowed in this state to all mankind; and no person shall be rendered incompetent to be a witness on account of his opinions on matters of religious belief; but the liberty of conscience hereby secured shall not be so construed as to excuse acts of licentiousness, or justify practices inconsistent with the peace or safety of this state."

The language of the provision is no broader than the construction given the federal "free exercise" clause and the cases construing the state provision [185] are entirely consistent with the conclusion reached herein. And while Article 11, section 4 of the State Constitution, which prohibits public aid to a school "in which any denominational tenet or doctrine is taught", has not been argued, the conclusion may be stated that since the instant prayer is not "denominational" that section would not exclude it.[186]

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[185] Lewis v. Board of Education, *supra*, n. 148, upheld Bible reading in New York City schools; New York League for Separation of Church and State v. Lyons, 173 Misc. 821, held the erection of a prison chapel and employment of a chaplain not to be a violation; Matter of Lewis v. Allen, *supra*, n. 148, found no violation in school recitation of the pledge of allegiance with the words "under God"; and Baer v. Kolmorgen, *supra*, n. 19, allowed display of a creche on a school lawn during school Christmas recess.

[186] The first three cases cited in n. 185 also interpret this section. In addition see O'Connor v. Hendrick, 184 N. Y. 421, holding that teachers wearing religious garb, and Smith v. Donahue, 202 App. Div. 656, holding that 345
the furnishing of textbooks to parochial school children did violate the section, and People *ex rel.* Lewis v. Graves, *supra*, n. 171, holding released time not violative. Judd v. Board of Education, *supra*, n. 23, which invalidated use of public funds for bus transportation of parochial students was changed by the 1938 amendment to the section. Also of interest is the Report of the Committee on Education and Funds Pertaining Thereto to the 1894 Constitutional Convention (REVISED RECORD OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF NEW YORK, MAY 8, 1894 TO SEPTEMBER 29, 1894 [1900], Vol. 5, p. 693). The Committee (at p. 706) recognized that its words could not bind a court, but stated its opinion to be that the section could not "be taken to prohibit the reading of the Bible in the public schools."

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In summary, the petition, as amended, is held legally sufficient, the Board's defenses are held insufficient and are dismissed, the petitioners' demand for a jury trial is denied for the reason that there is no triable issue of material fact, and the request for mandamus is, as a matter of discretion, denied [187] but the matter is remanded to the Board for further proceedings not inconsistent with the foregoing. An order to that effect may be settled on notice.

347 The Court wishes to thank all counsel for the excellent presentation not only in oral argument, but in the original and supplemental briefs. It is, perhaps, not amiss to conclude this opinion with the repetition of a sentence from the decision of Superintendent Spencer referred to in the beginning. Written one hundred and twenty years ago, the following statement, in the Court's view, most completely conforms to the requirements of both constitutional law and of reason:

> "The simple rule, so to exercise your own rights as not to infringe on those of others
> 348 will preserve equal justice among all, promote harmony, and insure success to our schools."

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[187] Matter of Ahern v. Board of Supervisors, 6 N. Y. 2d 376; Matter of Andresen v. Rice, 277 N. Y. 271, 282.

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Affidavit of No Other Opinion

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.:

WILLIAM J. BUTLER, being duly sworn, deposes and says: That he is one of the attorneys for the petitioner in this proceeding.

That no opinion other than that set forth herein was rendered by the Court below in making the order appealed from.

WILLIAM J. BUTLER 350

Sworn to before me this
18th day of February, 1960.

PETER B. SCHWARZKOPF
Notary Public, State of New York
No. 31-3559950
Qualified in New York County
Commission Expires March 30, 1961

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Stipulation Waiving Certification

Pursuant to Section 170 of the Civil Practice Act, it is hereby stipulated that the foregoing consists of true and correct copies of the notice of appeal, the order appealed from, and all the papers upon which the Court below acted in making said order appealed from, and the whole thereof, now on file in the office of the Clerk of the County of Nassau; and certification thereof by said Clerk, pursuant to Section 616 of the Civil Practice Act, is hereby waived.

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Dated: New York, March , 1960.

BUTLER, JARLOW & GELLER,
Attorneys for Petitioners-Appellants.

GUSS, NEIER & DAIKER,
Attorneys for
Respondents-Respondents.

HAHN, HAHN & FORD,
Attorneys for
Intervenor-Respondents-Respondents.

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ADDITIONAL PAPERS
TO THE
COURT OF APPEALS

355

Notice of Appeal

SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF NASSAU

Index No. 1824/1959

In the Matter of the Application of

STEVEN I. ENGEL, DANIEL LICHTENSTEIN, MONROE LERNER, LENORE LYONS and LAWRENCE ROTH,
Petitioners-Appellants,

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against

WILLIAM J. VITALE, JR., PHILIP J. FREED, MARY HARTE, ANNE BIRCH and RICHARD SAUNDERS, constituting the Board of Education of Union Free School District Number Nine, New Hyde Park, New York,
Respondents-Appellees,

directing them to discontinue a certain school practice

and

HENRY HOLLENBERG, ROSE LEVINE, MARTIN ABRAMS, HELEN SWANSON, WALTER F. GIBB, JANE EHLEN, RALPH B. WEBB, VIRGINIA ZIMMERMAN, VIRGINIA DAVIS, VIOLET S. COX, EVELYN KOSTER, IRENE O'ROURKE, ROSEMARIE PETELENZ, DANIEL J. REEHIL, THOMAS DELANEY and EDWARD L. MACFARLANE,
Intervenor-Respondents-Appellees.

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Sirs:

PLEASE TAKE NOTICE, that the above-named Petitioners, Steven I. Engel, Daniel Lichtenstein,

358 *Notice of Appeal*

Monroe Lerner, Lenore Lyons and Lawrence Roth, hereby appeal to the Court of Appeals from the order herein of the Appellate Division of the Supreme Court, Second Department, entered in the office of the Clerk of that court on October 17, 1960, affirming so much of the order herein of the Supreme Court, of Nassau, entered in the office of the Clerk of the County of Nassau on October 5, 1959, as denies the petition herein, denies the Petitioners' demand for a jury trial, and remands the matter to the Respondent Board of Education
359 for further proceedings.

Dated: New York, November 2, 1960.

Yours, etc.,

BUTLER, JABLOW & GELLER
Attorneys for Petitioners-
Appellants
400 Madison Avenue
New York 17, New York

360 To:

CLERK OF THE COUNTY
OF NASSAU
Mineola, New York

GUNN, NEIER & DAIKER, Esqs.
Attorneys for Respondents-
Appellees
49 Main Street
Port Washington, New York

HAHN, HAHN & FORD, Esq.
Attorneys for Intervenor-
Respondents-Appellees
117 Pennsylvania Avenue
Brooklyn 7, New York

Order of Affirmance 361

At a Term of the Appellate Division of the Supreme Court of the State of New York held in and for the Second Judicial Department at the Borough of Brooklyn, on the 17th day of October, 1960

Present:

Hon. Gerald Nolan,
Presiding Justice.
" George J. Beldock,
" Marcus G. Christ,
" Nicholas M. Pette, 362
" Arthur D. Brennan,
Justices.

In the Matter of the Application of

Steven I. Engel, Daniel Lichtenstein, Monroe Lerner, Lenore Lyons and Lawrence Roth,
Appellants,

against

William J. Vitale, Jr., Philip J. Freed, Mary Harte, Anne Birch and Richard Saunders, constituting the Board of Education of Union Free School District Number Nine, New Hyde 363
Park, New York,
Respondents,

directing them to discontinue a certain school practice

and

Henry Hollenberg, Rose Levine, Martin Abrams, Helen Swanson, Walter F. Gibb, Jane Ehlen, Ralph B. Webb, Virginia Zimmerman, Virginia Davis, Violet S. Cox, Evelyn Koster, Irene O'Rourke, Rosemarie Petelenz, Daniel J. Reehil, Thomas Delaney and Edward L. MacFarlane,
Intervenors-Respondents.

The above named Steven I. Engel, Daniel Lichtenstein, Monroe Lerner, Lenore Lyons and Law-

364 *Order of Affirmance*

rence Roth, petitioners in this proceeding having appealed to the Appellate Division of the Supreme Court from so much of an Order of the Supreme Court entered in the Office of the Clerk of the County of Nassau on October 5th, 1959, as denies the petition, denies the petitioners' demand for a jury trial and remands the matter to the respondent Board of Education for further proceedings, and said appeal having been taken pursuant to permission granted by the Special Term (Section 1304 of the Civil Practice Act), and the said
365 appeal having been argued by Mr. William J. Butler (Stanley Geller and Peter B. Schwartzkopf of Counsel) for appellants, and argued by Mr. Bertram B. Daiker (Wilford E. Neier of Counsel) for respondent Board of Education, and argued by Mr. Porter R. Chandler (Thomas J. Ford and Richard E. Nolan of Counsel) for intervenors-respondents, and submitted by Mr. Charles A. Brind (John P. Jehu, Elizabeth M. Eastman and George B. Farrington of Counsel) for Board of Regents of the University of the State of New York, as amicus curiae, and due deliberation
366 having been had thereon; and upon the opinions and decision slip of the court herein, heretofore filed:

It is Ordered that the order insofar as appealed from be and the same hereby is affirmed, without costs, upon the opinion of the Special Term.

Nolan, P.J., Christ, Pette and Brennan, J.J. concur; Beldock, J., concurs in part and dissents in part with opinion.

Enter:

John J. Callahan,
Clerk.

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Opinion of Appellate Division

SUPREME COURT

APPELLATE DIVISION

SECOND JUDICIAL DEPARTMENT

NOLAN, *P. J.*, BELDOCK, CHRIST, PETTE and BRENNAN, *JJ.*

In the Matter of the Application of

STEVEN I. ENGEL, DANIEL LICHTENSTEIN, MONROE LERNER, LENORE LYONS and LAWRENCE ROTH, 368
Appellants,

against

WILLIAM J. VITALE, JR., PHILIP J. FREED, MARY HARTE, ANNE BIRCH and RICHARD SAUNDERS, constituting the Board of Education of Union Free School District Number Nine, New Hyde Park, New York,
Respondents,

directing them to discontinue a certain school practice

and

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HENRY HOLLENBERG, ROSE LEVINE, MARTIN ABRAMS, HELEN SWANSON, WALTER F. GIBB, JANE EHLEN, RALPH B. WEBB, VIRGINIA ZIMMERMAN, VIRGINIA DAVIS, VIOLET S. COX, EVELYN KOSTER, IRENE O'ROURKE, ROSEMARIE PETELENZ, DANIEL J. REEHIL, THOMAS DELANEY and EDWARD L. MACFARLANE,
Intervenors-Respondents.

Appeal by petitioners from so much of an order of the Supreme Court at Special Term (Bernard S. Meyer, J.), entered October 5, 1959 in Nassau County, as denies the petition, denies petitioners'

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demurred for a jury trial, and remands the matter to the respondent Board of Education for further proceedings.

Permission to appeal was granted by the Special Term pursuant to section 1304 of the Civil Practice Act.

William J. Butler (Stanley Geller and Peter B. Schwartzkopf of counsel) for appellants.

Bertram B. Daiker (Wilford E. Neier of
371 counsel) for respondent Board of Education.

Porter R. Chandler (Thomas J. Ford and Richard E. Nolan of counsel) for intervenors-respondents.

Charles A. Brind (John P. Jehl, Elizabeth M. Eastman and George B. Farrington of counsel) for Board of Regents of the University of the State of New York, *amicus curiae*.

Per Curiam.

372 The purpose of this article 78 proceeding is to compel the local school board to discontinue its practice of requiring daily recitation in the schools of the "Regents' Prayer", which reads as follows: "Almighty God, we acknowledge our dependence upon Thee, and we beg Thy blessings upon us, our parents, our teachers and our Country."

The Justice at Special Term ir a comprehensive opinion. (*Matter of Engel* v. *Vitale*, 18 Misc. 2d 659), held that the pleadings do not raise a triable issue as to any material fact. He denied the petition as a matter of discretion; and he re-

manded the matter to the school board for further proceedings consistent with his opinion.

The further proceedings relate to the adoption of certain safeguards intended to eliminate any element of coercion or compulsion upon the student with respect to the daily recitation of the prayer.

We agree with the views expressed in the opinion of the learned Justice at Special Term.

Hence, the order insofar as appealed from should be affirmed, without costs, upon said opinion. 374

Nolan, P. J., Christ, Pette and Brennan, JJ., concur.

Beldock, J., concurs in part and dissents in part, with the following opinion:

While I agree that the decretal provisions of the order should be affirmed, I disagree as to the grounds stated by the Justice at Special Term for his determination, and I disagree as to the nature of the further proceedings suggested by him in his opinion.

In my opinion the order should be affirmed, not upon the grounds stated by said Justice, but solely 375 on the grounds that the voluntary recital of the prayer is not an act of religious training or teaching; that under proper safeguards against compulsion it is permissible; and that it violates neither the First Amendment to the Federal Constitution nor decisional law.

It is also my opinion that the order should be modified so as to remand the proceeding to the local Board of Education for further action consistent with my views as hereinafter expressed.

The question to be decided is whether an order of the local Board of Education directing the

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recitation of a prayer in the public schools at the opening of each school day, following the salute to the flag, violates the Federal and State constitutional guarantees of religious freedom, even though such order be amended and administered so as to make the recitation optional with each student.

The prayer, known as the "Regents' Prayer", is sponsored by the Board of Regents of the State of New York. It contains 22 words; re-
377 quires less than one minute to recite; is not accompanied by any comment; and reads as follows: "Almighty God, we acknowledge our dependence upon Thee, and we beg Thy blessings upon us, our parents, our teachers and our country." The recitation is led either by the teacher or by a student designated by the teacher, with the other class students repeating the prayer.

The First Amendment to the Federal Constitution forbids the making of laws "respecting an establishment of religion, or prohibiting the free exercise thereof". The State Constitution (N. Y. Const., art I, 3) provides that the "free exercise
378 and enjoyment of religious profession and worship, without discrimination or preference, shall forever be allowed in this state to all mankind."

The question as to whether a school board's order requiring the teacher, within the classroom, to cause a prayer to the Almighty to be recited, violates the First Amendment to the Federal Constitution and corresponding provisions of the State Constitution (as well as the question of selected Bible reading in the classroom), has been the subject of considerable controversy in this country for more than a century. The question is

of grave concern to all. The judicial pronouncements thereon are in conflict.

I have no doubt that the *compulsory* recitation of a prayer in the classroom violates the constitutional provisions. I have concluded, however, that the prayer here involved (which I agree is nonsectarian and nondenominational), does not constitute religious teaching and, if voluntary and circumscribed by proper safeguards, does not violate the constitutional proscription of laws "respecting an establishment of religion". Nor 380
do I find the prayer to be in conflict with recent decisional law on the related subject of teaching sectarian religion during the "released time" period.

From the point of view of policy I fully subscribe to the statement of principle in the Regents' Statement of Moral and Spiritual Training in the Schools, adopted November 30, 1951, to wit: "Belief in and dependence upon Almighty God was the very cornerstone upon which our Founding Fathers builded." It cannot be gainsaid that, above all things, it is essential for our children to be exposed to programs which emphasize the 381
moral and spiritual heritage which is America's and to be inspired by the examples of their ancestors toward a greater respect for lawful authority, for love of God and respect for parent and home. However, we are not now dealing with a matter of policy, but with one of power.

The basic issue here deals with the power of the school board to *direct* the recital of this prayer *on* school premises *under the supervision of the school teachers*. It is not disputed by the litigants that the prayer is of a religious nature. The

main dispute is as to whether it is religious instruction and whether it is said by the students under compulsion.

The Justice at Special Term pointed out that (p. 672) "the State's interest in familiarizing students with the religious nature of our heritage would not justify the use of prayer as a vehicle for imparting that knowledge since there are other equally effective and constitutionally uninhibited means of achieving that end."

383 The Justice at Special Term also declared (p. 673) that if the purpose is to inculcate in the students a love of God, then "as an exercise required of all pupils, it would constiute religious instruction in violation of the 'establishment' clause", and as a permissive exercise, unless participating children were free "to adopt any posture, use any gesture, wear any attire, use any language, or follow any other practice which his or her own religious beliefs may dictate", it would "violate the 'free exercise' clause of the Federal and State Constitutions, as well as the parent's rights, * * * under the due process clause to con-
384 trol the education of his child."

The Justice at Special Term sustained the validity of the prayer and the power of the school board to direct it. He based his conclusion upon the theory that prayer in the schools is permissible "not as a means of teaching 'spiritual values' but because traditionally, and particularly at the time of the adoption of the First and Fourteenth Amendments, *this was the accepted practice*." (Italics supplied.) (*Matter of Engel v. Vitale*, 18 Misc. 2d 659, 673, *supra*.) Apparently, therefore, the basis of his conclusion is that at the time of the amendments it was the accepted practice to

utilize prayer in the public schools and, hence, it is proper to resort to prayer today.

While I agree with the final conclusion reached by the learned Justice at Special Term, I am in total disagreement with his reasons therefor, and particularly with the "accepted practice" theory.

My sole reason for sustaining the "Regents' Prayer" is that, in my opinion, the prayer here involved *does not constitute religious teaching.* The recital of this prayer does nothing more than acknowledge the existence of God and dependence upon him. It gives no training or instruction of 386
any religious nature whatever. There can be no constitutional objection to a prayer which is said without rites or ceremony or doctrinal teaching, and which serves at the beginning of each day to give each student who believes in God "a brief moment with eternity" and a feeling of "humility before the Supreme Power" (*Doremus* v. *Board of Educ.*, 5 N. J. 435, 75 A. 2d 880, 884, 889, appeal dismissed 342 U. S. 429). Such a prayer merely affirms and reaffirms "that this a religious nation"; it recognizes (as do the Federal Constitution, every State Constitution and every colonial 387
grant and charter beginning with the one to Christopher Columbus) "a profound reverence for religion and an assumption that its influence in all human affairs is essential to the well being of the community" (*Holy Trinity Church* v. *United States*, 143 U. S. 457, 468, 470).

I agree fully with the following statements made by the Supreme Court of New Jersey in the *Doremus case* (75 A. 2d 880, *supra*, pp. 882, 889):

> "Was it the intent of the First Amendment that the existence of a Supreme Being

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should be negated and that the governmental recognition of God should be suppressed? Not that, surely * * *.

"Instances could be multiplied going to the undeniable result that the Constitution itself assumes as an unquestioned fact the existence and authority of God and that * * * all branches of the government followed a course of official conduct which openly accepts the existence of God as Creator and Ruler of the Universe * * *. (p. 882.)

389 "The fact is that the First Amendment does not say, and so far as we are able to determine was not intended to say, that God shall not be acknowledged by our government as God. Our view is that a prohibition which is not in the language of the amendment and which is contrary to the intention of those who framed and adopted the instrument, should not now be read into it." (p. 889.)

While the authorities are in conflict, the general
390 or prevailing rule, supported by the weight of authority, appears to be that the recitation of a nondenominational prayer without comment (and particularly an informal prayer), is not prohibited by the constitutional provisions, either State or Federal, provided: (1) participation by the student in such recitation is not compulsory; (2) such recitation merely tends "to inculcate fundamental morality" in the students; and (3) it is not "carried so far as to emphasize the teaching of a particular sect" or of any particular religious doctrine (Annotations, 3 41 A. L. R. 1144, 5 A. L. R. 866, 45 A. L. R. 2d 742; 47 Am. Jur., Schools, § 210, and cases there cited;

Lewis v. *Board of Educ. of City of N. Y.*, 157 Misc. 520, 528-550, mod. on other grounds, 247 App. Div. 106, appeal dismissed, 276 N. Y. 490; *Doremus* v. *Board of Educ.*, 5 N. J. 435, appeal dismissed 342 U. S. 429, *supra*; *contra*; *Schempp* v. *School Dist. of Abington Township Pa.*, 177 F. Supp. 398, 404-407).

In my opinion, the prayer here is not said pursuant to any law or order "respecting an establishment of religion" (U. S. Const., 1st Amdt.). It is said pursuant to an order which authorizes, as prescribed by both the State and Federal Constitutions, the "free exercise" and enjoyment 392
of religious profession and worship, without discrimination or preference. As to those who believe in God, the prayer constitutes simply a "pledge of allegiance" to Him and an invocation of His divine blessing. In other words, it is a voluntary confession of faith in the exercise of the religious freedom guaranteed to every individual by the State and Federal Constitutions. Accordingly, it does not partake in the slightest degree of religious training or religious teaching.

In a recent case (*Matter of Lewis* v. *Allen*, 5 393
Misc. 2d 68, 73, *supra*) in which an attack was made upon the inclusion of the words "under God" in the pledge of allegiance to the flag, Mr. Justice Bookstein at Special Term, Albany County, made these statements, which are quite apropos:

> "If the petitioners' contention be sound, it may be wondered whether the public school curriculum might properly include the Declaration of Independence and the Gettysburg Address. Could 'America' ('Protect us by thy might, Great God, our King!') be sung in a public school without offending the First

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> Amendment? And might not the presidential oath of office have questionable constitutional status?"

The contention that acknowledgments of and references to Almighty God are acceptable and desirable in all other phases of our public life but not *in our public schools* is, in my judgment, an attempt to stretch far beyond its breaking point the principle of separation of church and state and to obscure one's vision to the universally ac-
395 cepted tradition that ours is a nation founded and nurtured upon belief in God.

In the most recent pronouncement by the United States Supreme Court which dealt with the "released time" program in our public schools (*Zorach* v. *Clauson*, 343 U. S. 306), the court gave to the nation these basic principles for its guidance (pp. 312-314):

> "There is much talk of the separation of Church and State in the history of the Bill of Rights and in the decisions clustering around the First Amendment. (See *Everson*
396 v. *Board of Education*, 330 U. S. 1; *McCollum* v. *Board of Education*, *supra*). There cannot be the slightest doubt that the First Amendment reflects the philosophy that Church and State should be separated. And * * * the separation must be complete and unequivocal. The First Amendment within the scope of its coverage permits no exception; the prohibition is absolute. *The First Amendment, however, does not say that in every and all respects there shall be a separation of Church*

and State. Rather, it studiously defines the manner, the specific ways, in which there shall be no concert or union or dependency one on the other. That is the common sense of the matter. Otherwise the state and religion would be aliens to each other—hostile, suspicious, and even unfriendly. * * * Prayers in our legislative halls; the appeals to the Almighty in the messages of the Chief Executive; the proclamations making Thanksgiving Day a holiday; 'so help me God' in our court-room oaths—these and all other references to the Almighty that run through our laws, our public rituals, our ceremonies would be flouting the First Amendment. A fastidious atheist or agnostic could even object to the supplication with which the court opens each session: 'God save the United States and this Honorable Court'. (Italics supplied.) 398

* * *

"We are a religious people whose institutions presuppose a Supreme Being. We guarantee the freedom to worship as one chooses. We make room for as wide a variety of beliefs and creeds as the spiritual needs of man deem necessary. We sponsor an attitude on the part of government that shows no partiality to any one group and that lets each flourish according to the zeal of its adherents and the appeal of its dogma. When the state encourages religious instruction or cooperates with religious authorities by adjusting the schedule of public events to sectarian needs, it follows the best of our traditions. For it then respects the religious nature of our people and accommodates the public service 399

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to their spiritual needs. To hold that it may not would be to find in the Constitution a requirement that the government show a callous indifference to religious groups. That would be preferring those who believe in no religion over those who do believe. Government may not finance religious groups nor undertake religious instruction nor blend secular and sectarian education nor use secular institutions to force one or some religions on any person. But we find no con-
401 stitutional requirement which makes it necessary for government to be hostile to religion and to throw its weight against efforts to widen the effective scope of religious influence. The government must be neutral when it comes to competition between sects. It may not thrust any sect on any person. It may not make a religious observance compulsory. It may not coerce anyone to attend church, to observe a religious holiday, or to take religious instruction. But it can close its doors or suspend its operations as to those
402 who want to repair to their religious sanctuary for worship or instruction. No more than that is undertaken here."

The prayer here under attack is indeed a part of man's immemorial, inseparable and absolute right to declare his faith and to acknowledge and place his trust in God. The constitutional provisions are intended to protect and to perpetuate this right in man and never to deprive him of it or to discriminate against it. And, in furtherance of such protection, the state must scrupulously observe a strict neutrality; it may not

favor or disfavor the believer over the non-believer or one sect over another (cf. *Everson* v. *Board of Educ.*, 330 U. S. 1, 18, 64; *Matter of Zorach* v. *Clauson*, 303 N. Y. 161, 170, 180-183, affd. *sub nom. Zorach* v. *Clauson*, 343 U. S. 306, 311-315, *supra*).

Of course, the "man of no religion has a right to act in accordance with his lack of religion" but he has "no right to insist that others shall have no religion" (*Reichwald* v. *Catholic Bishop of Chicago*, 258 Ill. 44, 48), particularly since, as stated, from the very inception of this country we have 404
been essentially "a religious people whose institutions presuppose a Supreme Being" (*Zorach* v. *Clauson*, 343 U. S. 306, 313, *supra*; *cf. Holy Trinity Church* v. *United States*, 143 U. S. 457, 465-470, *supra*). The right to disbelieve as well as to believe is guaranteed by the First Amendment, and the disbeliever may therefore refrain from engaging in prayer. But the Amendment affords the disbeliever "no preference over those who do believe in God and who * * * choose to express that belief" (*Matter of Lewis* v. *Allen*, 5 Misc. 2d 68, 75, *supra*). 405

As pointed out by Judge Desmond in his concurring opinion in the *Zorach* case (*supra*, pp. 181-183), it "is inconceivable" that the First Amendment to the Federal Constitution "was ever meant to prohibit governmental encouragement of, or cooperation with, religions generally" because "ours is a religious nation" and because such aid and encouragement, "as distinguished from establishment or support of separate sects, has never been considered offensive to the American constitutional system."

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Here, when the local school board authorizes the prayer to be said at the opening of the school day by all those *desiring* to participate, it does no more than to postpone the period of the secular instruction for the minute or less required for the prayer or acknowledgment of religious faith. In my opinion such an accommodation of the secular education to the voluntary prayer or confession of religious faith directed by this local Board of Education, is not religious teaching or religious instruction. It is a proper and commendable practice which is in keeping with the best traditions of this country and with the relevant provisions of the State and Federal Constitutions (cf. *Matter of Zorach* v. *Clauson*, 303 N. Y. 161, 170, 180-183, *supra; Zorach* v. *Clauson*, 343 U. S. 306, 311-315, *supra; Matter of Lewis* v. *Allen*, 5 Misc. 2d 68, *supra; 64th St. Residences* v. *City of New York*, 10 Misc. 2d 841, 845-847; *Baer* v. *Kolmorgen*, 14 Misc. 2d 955, 957; *Baer* v. *Kolmorgen*, 14 Misc. 2d 1015, 1016-1017, 1021-1022).

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I now come to the contention as to the compulsory nature of the prayer. It is claimed that subtle pressure is created by reason of the necessity for the parent and the child to request that the child be excused from participation, and that such pressure *compels* participation in the prayer. In remanding the matter to the Board of Education, the Justice at Special Term has left the procedure to be adopted entirely to the Board's wisdom.

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However, the said Justice in his opinion expressed his own views as to some of the methods to be employed to eliminate the elements of coercion and "subtle" pressure. In doing so he has recommended, among other things: (1) that the child to be excused may arrive "later" or appear

in class after the recital of the prayer; (2) that the prayer may be said in "common assembly" and the excused child sent to another room; and (3) that there shall be no comment made with respect to the excused child or any requirement imposed on him as to his posture or attire (similar to the practice adopted by the New York City Board of Education in its operation of the released time program).

I fully agree with the last recommendation with respect to the omission of any comment and of any requirement as to posture and attire. I disagree, however, with respect to the other stated recommendations. 410

It is my opinion that the choice of action to be followed should not be left to the Board of Education to be *mandated* upon the parent; but that the *free choice* of the *alternative procedures* should be *left to the parent* pursuant to a formula to be adopted by the Board after thorough discussion and consultation with all interested groups.

I disapprove of the recommendation that the prayer be said in common assembly and the excused child be sent to another room. In such proposed practice I see a potential pressure which, as to some students, may rise to the level of compulsion or coercion, and which as to many students may result in a schism and divisiveness. 411

I likewise disapprove of the recommendation that the excused child may report "late". I believe that the basic discipline of any school requires a uniform time of commencement for all students in the same grades or classes.

My own preference is that the prayer be one not mandated and required to be repeated or recited verbatim by all in attendance in the room,

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pursuant to the order of the school board. I would suggest that the recitation of the prayer be put on a voluntary basis and that it be conducted in a manner similar to that of an invocation or benediction by a priest, minister, rabbi, or layman at public or private functions attended by men of all faiths, namely: that the prayer be recited by the teacher or by a student designated by the teacher; that the other students in the class be invited (not directed) to join in the prayer if they so desire by repeating it aloud or *sotto voce* or by silent
413 meditation, and that all those present who elect not to join may *refrain* from participating and remain quiet. In other words, even though those present in the classroom may include all the unexcused students only, nevertheless there should be no requirement for the students to repeat the prayer *aloud*. Each student should be free to do so or to remain silent, according to his own conscience and his parental instruction.

It may well be that, despite all the practicable safeguards taken, some vestige of compulsion due to embarrassment may still remain, because when
414 one abstains "it sets him apart as a dissenter, which is humiliating" (*McCollum* v. *Board of Educ.*, 333 U. S. 203, 232). Such embarrassment, however, is the inevitable consequence of dissent; it is the price which every nonconformist must pay. But, as pointed out by Mr. Justice Jackson in the McCollum case (p. 233):

> "Even admitting this to be true, it may be doubted whether the Constitution which, of course, protects the right to dissent, can be construed also to protect one from the embarrassment that always attends nonconformity, whether in religion, politics, behavior or

dress. Since no legal compulsion is applied to * * * [the dissenting student] and no penalty is imposed or threatened from which we may relieve him, we can hardly base jurisdiction [to intervene and stop the practice] on this ground."

In conclusion, it is suggested that in the formation of its procedures on the remand, the school board may well use as a guide the classic statement made in *1839* by the then New York State Superintendent of Schools, Mr. Spencer. He said: 416

"'Both parties have rights; the one to bring up their children in the practice of publicly thanking their Creator for his protection, and invoking his blessing; the other of declining in behalf of their children, the religious services of any person in whose creed they may not concur, or for other reasons satisfactory to themselves. These rights are reciprocal, and should be protected equally; and neither should interfere with the other. Those who desire that their children should engage in public prayer have 417 no right to compel other children to unite in the exercise, against the wishes of their parents. Nor have those who object to this time, place or manner of praying, or to the person who conducts the exercises, a right to deprive the other class of the opportunity of habituating their children to what they conceive an imperious duty. Neither the common school system, nor any other social system, can be maintained, unless the con-

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> scientious views of all are equally respected. The simple rule, so to exercise your own rights as not to infringe on those of others, will preserve equal justice among all, promote harmony, and insure success to our schools." (*Matter of Engel* v. *Vitale*, 18 Misc. 2d 659, 661-662, supra.)

This statement of Superintendent Spencer is as valid today as it was when made. It summarizes, perhaps better than elsewhere, the re-
419 spective legal rights of the believer and the nonbeliever and the best means of preserving such rights in relation to prayer in the classroom.

It is my opinion that the "Regents Prayer" may be validly integrated into the curricula of the public schools, provided that participation in such daily prayer is made optional with each student in accordance with the safeguards here suggested.

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Stipulation Waiving Certification of Record to Court of Appeals

IT IS HEREBY STIPULATED AND AGREED by and between the attorneys for the respective parties hereto that the foregoing are true and correct copies of the Papers on Appeal to the Appellate Division, Second Department; the Order of Affirmance and the Notice of Appeal to the Court of Appeals, all of which are on file in the office of the Clerk of the County of Nassau, as well as the Opinion of the Appellate Division which is on file with the Clerk of the Appellate Division, Second Department.

422

Certification of all of the foregoing papers is hereby waived.

Dated: New York, December , 1960.

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GUNN, NEIER & DAIKER,
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423

HAHN, HAHN & FORD,
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[fol. 142]

IN THE COURT OF APPEALS OF THE STATE OF NEW YORK

In the Matter of STEVEN I. ENGEL et al., Appellants, v. WILLAIM J. VITALE, JR., et al., Constituting the Board of Education of Union Free School District Number Nine, New Hyde Park, New York, Respondents. HENRY HOLLENBERG, et al., Intervenors-Respondents.

OPINION—Decided July 7, 1961

* * * * * * *

Chief Judge DESMOND. In 1951 and again in 1955 the Board of Regents, governing body of our State public school system, recommended to all local school boards that "at the commencement of each school day the act of allegiance to the Flag might well be joined with this act of reverence to God: 'Almighty God, we acknowledge our dependence upon Thee, and we beg Thy blessings upon us, our parents, our teachers and our Country'". In 1958 the respondents, who are the board members of a public school district in [fol. 143] Nassau County, conformed to the Regents' recommendation and gave instructions to the teaching staff to adopt the practice in the district's schools. Petitioners, taxpayers in the district and parents of children attending the schools and all (except one "non-believer") being members of various religious bodies, brought this proceeding for an order directing the board to discontinue the practice. They assert that it is unlawful because of the prohibitions of the First Amendment ("no law respecting an establishment of religion, or prohibiting the free exercise thereof") and the command of section 3 of article I of our State Constitution ("The free exercise and enjoyment of religious profession and worship, without discrimination or preference, shall forever be allowed in this state to all mankind").

The order here appealed from contains adequate provisions to insure that no pupil need take part in or be present during the act of reverence, so any question of "compulsion" or "free exercise" is out of the case (see *Zorach* v. *Clauson*, 343 U. S. 306).

What remains of appellants' argument is this: that the saying of the "Regents prayer" as a daily school exercise is a form of State-sponsored religious education and is accordingly an unconstitutional "establishment of religion". If the utterance of these reverential words was "religious education", then providing such education would be so far beyond the powers of a public school board as to be wholly arbitrary and unlawful, so that the courts would need no constitutional warrant for forbidding it. But it is not "religious education" nor is it the practice of or establishment of religion in any reasonable meaning of those phrases. Saying this simple prayer may be, according to the broadest possible dictionary definition, an act of "religion", but when the Founding Fathers prohibited an "establishment of religion" they were referring to official adoption of, or favor to, one or more sects. They could not have meant to prohibit mere professions of belief in God for, if that were so, they themselves in many ways were violating their rule when and after they adopted it. Not only is this prayer not a violation of the First Amendment (no decision of this or of the United States Supreme Court says or suggests that it is) but a holding that it is such a violation would be in defiance of all American history, and such a holding would destroy a part of the essential foundation of the American governmental structure.

The "Regents prayer" is an acknowledgment of our dependence upon Almighty God and a petition for the bestowal of His blessings. It includes an acknowledgment of the existence of a Supreme Being just as does the Declaration of Independence and the Constitutions of each of the 50 States of the Union, including our own. In construing even a Constitution some attention must be paid to the obvious intent of those who drafted it and adopted it (*Matter of Carew* v. *Morton*, 297 N. Y. 361). That the First Amend-[fol. 144] ment was ever intended to forbid as an "establishment of religion" a simple declaration of belief in God is so contrary to history as to be impossible of acceptance. No historical fact is so easy to prove by literally countless illustrations as the fact that belief and trust in a Supreme Being was from the beginning and has been continuously part of the very essence of the American plan of govern-

ment and society. The references to the Deity in the Declaration of Independence; the words of our National Anthem: "In God is our trust"; the motto on our coins; the daily prayers in Congress; the universal practice in official oaths of calling upon God to witness the truth; the official thanksgiving proclamations beginning with those of the Continental Congress and the First Congress of the United States and continuing till the present; the provisions for chaplaincies in the armed forces; the directions by Congress in modern times for a National Day of Prayer and for the insertion of the words "under God" in the Pledge of Allegiance to the Flag; innumerable solemn utterances by our Presidents and other leaders—all these and many more make historically unescapable the flat statement in *Zorach* v. *Clauson* (343 U. S. 306, 313, *supra* [1952]) that: "We are a religious people whose institutions presuppose a Supreme Being", which paraphrased the Supreme Court's similar assertion in 1892 in the *Holy Trinity Church* case (*Holy Trinity Church* v. *United States*, 143 U. S. 457). As Justice BELDOCK of the Appellate Division wrote in this case: "The contention that acknowledgments of and references to Almighty God are acceptable and desirable in all other phases of our public life but not *in our public schools* is, in my judgment, an attempt to stretch far beyond its breaking point the principle of separation of church and State and to obscure one's vision to the universally accepted tradition that ours is a Nation founded and nurtured upon belief in God."

The "universally accepted tradition" referred to by Justice BELDOCK has been maintained without break from the days of the Founding Fathers, all of whom believed in the existence of God (see Cousins, In God We Trust), to the day of the inauguration of President Kennedy. It is an indisputable and historically provable fact that belief and trust in a Creator has always been regarded as an integral and inseparable part of the fabric of our fundamental institutions. It is not a matter of majority power or minority protection. Belief in a Supreme Being is as essential and permanent a feature of the American governmental system as is freedom of worship, equality under the law and due process of law. Like them it is an American absolute,

an application of the natural law beliefs on which the Republic was founded and which in turn presuppose an Omnipotent Being.

The motives and purposes of the Regents and of the local board are noble. The success of the practice is problematical. But there is no problem of constitutionality.

The order should be affirmed, without costs.

[fol. 145]

Frossel, J. (concurring). The thoughtful and thorough opinion written at Special Term and its review of the relevant history and the authorities, culminating in its order of March 17, 1961, renders extended discussion unnecessary.

We are not here concerned with the statements of the Board of Regents or of the local school board as to their motives or purposes in the eventual promulgation of the challenged recitation.

The narrow question presented is: Do the Federal and State Constitutions prohibit the recitation by children in our public schools of the 22 words acknowledging dependence upon Almighty God, and invoking His blessing upon them, their parents and teachers, and upon our country? To say that they do seems to me to stretch the so-called separation of church and State doctrine beyond reason.

History and common experience teach us that the perception of a Supreme Being, commonly called God, is experienced in the lives of most human beings. Some, it is true, escape it, or think they do for a time. In any event, that perception is manifest, independent of any particular religion or church, and has become the foundation of virtually every recognized religious faith—indeed, the common denominator. One may earnestly believe in God, without being attached to any particular religion or church. Hence a rule permitting public school children, willing to do so, to acknowledge their dependence upon Him, and to invoke His blessings, can hardly be called a "law respecting an establishment of religion" or "prohibiting the free exercise thereof" in transgression of the First Amendment, which in nowise prohibits the recognition of God, or laws respecting such recognition.

The challenged recitation follows the pledge of allegiance, which itself refers to God. School children are permitted to sing "America", the fourth stanza of which is indeed a prayer, invoking the protection of "God", "Author of Liberty". The preamble to our State Constitution, which is taught in our public schools, provides: "We the People of the State of New York, grateful to Almighty God for our Freedom". Virtually every State Constitution in the United States, as well as the Declaration of Independence, contains similar references. To say that such references, and others of like nature employed in the executive, legislative and judicial branches of our Government (see *Zorach* v. *Clauson*, 343 U. S. 306, at pp. 312-313), unrelated to any particular religion or church, may be sanctioned by public officials everywhere but in the public school room defies understanding.

[fol. 146] As Mr. Justice DOUGLAS said, in the *Zorach* case (*supra*, at p. 313), in holding that the New York City released time program does not violate the First Amendment, "We are a religious people whose institutions presuppose a Supreme Being. We guarantee the freedom to worship as one chooses. We make room for as wide a variety of beliefs or creeds as the spiritual needs of man deem necessary. We sponsor an attitude on the part of government that shows no partiality to any one group and that lets each flourish according to the zeal of its adherents and the appeal of its dogma." Here no partiality is shown, nor are classrooms being turned over to religious instructors as in *McCollum* v. *Board of Educ.* (333 U. S. 203). Any effort of a particular group to promote its own beliefs, doctrines, tenets and dogma must be carried on outside the public school, and any law to the contrary would violate the First Amendment. (*McCollum* v. *Board of Educ., supra.*)

As we see it, then, the challenged recitation was rightly upheld. It is not compulsory, is clearly nonsectarian in language, and neither directly nor indirectly even suggests belief in any form of organized or established religion. It permits each child to express gratitude to God and to invoke His blessing, to be steadfast in the faith of his acceptance if he has one; it compels no one, directly or indirectly, to

do anything, if that be his or his parents' wish. All remain free, and thus we do not show preference as between "those who believe in no religion" and "those who do believe" (*Zorach* v. *Clauson*, *supra*, p. 314).

The orders appealed from should be affirmed, without costs.

Burke, J. (concurring). I concur in the opinions of Chief Judge Desmond and Judge Froessel. The dissenting opinion not only inadvertently distorts the purposes of the First Amendment, but is also self-contradictory. The First Amendment, it admits, specifically forbids any kind of monism in respect to religion. The amendment, it concedes, encourages diverse religious tenets. But the opinion reads into the amendment *an attempt to compel conformity* in the field of education—in other words, a "compulsory unification of opinion" in all school boards to totally reject any religious element in education and banish it from the schools. This, of course, would force on the children a culture that is founded upon secularist dogma.

This interpretation rests on a misunderstanding. There is no language in the amendment which gives the slightest basis for the interpolation of a Marxist concept that mandates a prescribed ethic. According to the opinion, the separation of church and State which was intended to encourage *religious* interests among our people would become the constitutional basis for the *compulsory exclusion of any religious element* and the consequent promotion and [fol. 147] advancement of atheism. It is not mere neutrality to prevent voluntary prayer to a Creator; it is an interference by the courts, contrary to the plain language of the Constitution, on the side of those who oppose religion.

Dye, J. (dissenting). The question posed on this appeal is whether the recital of a school-sponsored prayer may be required as a daily procedure in a public school. This question comes about as a result of a recommendation duly adopted at a special meeting of the Board of Education of Union Free School District Number Nine, New Hyde Park, New York, held July 8, 1958, requiring that "the

regents prayer be said daily in our schools", pursuant to which the board gave a "direction to the District Principal that this be instituted as a daily procedure to follow the salute to the flag" (Minutes, Board of Educ., Union Free School Dist. No. 9, of meeting July 8, 1958).

The Regents prayer is worded as follows: "Almighty God, we acknowledge our dependence upon Thee, and we beg Thy blessings upon us, our parents, our teachers and our Country." It derives from the "Regents Statement on Moral and Spiritual Training in the Schools", issued by the New York State Board of Regents, as duly adopted at a meeting held on November 30, 1951. This statement was reaffirmed and supplemented by "The Regents Recommendations for School Programs on America's Moral & Spiritual Heritage", unanimously adopted March 25, 1955. The recommendations requoted the opening sentence of the 1951 statement, viz.: "Belief in and dependence upon Almighty God was the very cornerstone upon which our Founding Fathers builded", and went on to express the conviction that "such fundamental belief and dependence is the best security against the dangers of these difficult days and the adoption of their recommendations the best way of insuring that this Government and our way of life shall not perish from the earth".

The Regents recommended that school programs be instituted, stressing the moral and spiritual heritage of America. It was in response to this recommendation that the respondent board promulgated the above order.

In the schools in the respondents' district, it is the practice to say the prayer immediately after the salute to the flag, as a required daily procedure. It is led by the teacher or by a student selected by the teacher, with other students joining therein. While it does not appear whether any students leave the classroom during such recital, no penalty attaches for non-participation, since the board announced that, as a matter of policy, no child was to be required or encouraged to join in said prayer against his or her wishes. [fol. 148] The petitioners with one exception—a nonbeliever—are all members of various religious faiths and, as taxpayers and parents of children attending public schools within the district, have challenged the saying of the prayer and have demanded its discontinuance on the ground that

it amounts to an abridgement of religious freedom guaranteed by the First and Fourteenth Amendments to the Federal Constitution and section 3 of article I and section 4 of article XI of the New York State Constitution which, in essence, is to say that it constitutes a breach in Jefferson's metaphorical wall "separating church and state".

No one doubts for a moment that we are a religious people. It can be safely said that under no other government —past or present—have the people enjoyed such an untrammeled freedom to worship as they please and to indulge such freedom in more different ways and according to more diverse tenets and beliefs than do the people of the United States. The number of sects and religious groups are almost countless, due, no doubt, to the varied origins of our heterogeneous population who have come here seeking, among other things, an asylum from religious persecution and a freedom to gain salvation in their own chosen way. The recognition of the need for the spiritual comfort and solace derived from religious practices was a first concern of the Founding Fathers who gave it expression in the simple and plainly worded phrase: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof". (U. S. Const., 1st Amdt.) Our State Constitution reiterates the same thought as "The free exercise and enjoyment of religious profession and worship, without discrimination or preference, shall forever be allowed in this state to all mankind". (N. Y. Const., art. I, §3.)

The natural consequence of these fundamental principles is not only to allow but to guarantee to all citizens an absolute freedom in the exercise of religious belief or no belief. By the same token, our State is free to function without interference by or dictation from an organized church. This mutual forbearance in spirit and in practice has eliminated divisiveness in a most sensitive area, created mutual respect for both church and State and has unified our people in a way that no other force could do.

The development of the precise meaning of the establishment and freedom clauses of the First Amendment has had a long and interesting history which needs no narration here. Very recently the United States Supreme Court has

dealt with it in a series of historical decisions which, though varying in details, make it clear that the establishment and freedom clauses of the First Amendment constitute a complete and unequivocal separation of church and State, a wall [fol. 149] which "must be kept high and impregnable", for in modern times it means at least this: "Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or nonattendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and *vice versa*." (*Everson* v. *Board of Educ.*, 330 U. S. 1, 15-16.) A year later, in *McCollum* v. *Board of Educ.* (333 U. S. 203, 210), involving a released time program in Illinois public schools, the United States Supreme Court found that the program, which in substance permitted outside teachers sponsored by religious organizations to give instruction in religion to school children, in the school building, during the school hours, as a substitute for the secular teaching provided in accordance with the compulsory education law, was "beyond all question a utilization of the tax-established and tax-supported public school system to aid religious groups to spread their faith". This, as Mr. Justice Black took pains to point out (pp. 211-212), did not "manifest a government hostility to religion or religious teaching. A manifestation of such hostility would be at war with our national tradition as embodied in the First Amendment's guarantee of the free exercise of religion", and the key to its meaning "rests upon the premise that both religion and government can best work to achieve their lofty aims if each is left free from the other within its respective sphere". It is interesting to note that in *McCollum* the four dissenting Justices in *Everson* con-

curred. Mr. Justice FRANKFURTER, while recognizing (p. 213) the existence of a clash in views as to "what the wall separates", nonetheless made it very clear that the First and Fourteenth Amendments "have a secular reach far more penetrating in the conduct of Government than merely to forbid an 'established church' ".

The New York released time program was tested and approved in *Zorach* v. *Clauson* (343 U. S. 306). This permitted release of public school students during class hours for religious instruction off the school grounds, provided that written parental approval was first obtained. All costs were paid by the interested religious organizations. Some have read *Zorach* as a retreat from *McCollum*, but a majority of the United States Supreme Court did not think so. [fol. 150] In sustaining the program, the court removed any possible doubt that the principle of "complete and unequivocal" separation enunciated in *McCollum* was being reaffirmed since "the prohibition is absolute" (p. 312). As the court expressed it, "*We follow the McCollum case*" (p. 315; italics supplied). In deciding the merits as they did, the United States Supreme Court took the view that New York was "adjusting the schedule of public events to sectarian needs * * * [in the] best of our traditions", for to hold otherwise, in its opinion, "would be to find in the Constitution a requirement that the government show a callous indifference to religious groups. * * * The government must be neutral when it comes to competition between sects. It may not thrust any sect on any person. It may not make a religious observance compulsory. It may not coerce anyone to attend church, to observe a religious holiday, or to take religious instruction. But it can close its doors or suspend its operations as to those who want to repair to their religious sanctuary for worship or instruction. No more than that is undertaken here" (p. 314).

It is also interesting to note that in *McGowan* v. *Maryland* (366 U. S. 420) Mr. Justice DOUGLAS took occasion to sharpen what he had previously said in *Zorach* about our being a "religious people" by writing:

"But those who fashioned the Constitution decided that if and when God is to be served, His service will not be motivated by coercive measures of government. * * * [The

First Amendment] means, as I understand it, that if a religious leaven is to be worked into the affairs of our people, it is to be done by individuals and groups, not by the Government. * * * The idea, as I understand it, was to limit the power of government to act in religious matters (*Board of Education* v. *Barnette*, *supra*; *McCollum* v. *Board of Education*, 333 U. S. 203), not to limit the freedom of religious men to act religiously nor to restrict the freedom of atheists or agnostics.

"The First Amendment commands government to have no interest in theology or ritual; * * * On matters of this kind government must be neutral." (*McGowan* v. *Maryland*, 366 U. S. 420, 563-564, *supra*.)

Very recently *McCollum* (*supra*) was employed to strike down Maryland's "belief in God" test for public office as an unconstitutional invasion of "freedom of belief and religion" and, accordingly, unenforcible (*Torcaso* v. *Watkins*, 367 U. S. 488, 495), the Supreme Court stating: "Neither [a State or the Federal Government] can constitutionally pass laws nor impose requirements which aid all religions as against non-believers, and neither can aid those religions based on a belief in the existence of God as against those religions founded on different beliefs." It is clear, therefore, that the "establishment" clause should not have [fol. 151] the narrow application which a majority here would ascribe to it, and that it bars the action taken by the school board.

Running through the fabric of these definitive decisions, like the pattern of a tree of life in an intricate tapestry, is a clearly defined line of demarcation between church and State, which may not be overstepped in the slightest degree in favor of either the church or the State. In such light, a board of education may not require the saying of the Regents prayer as a daily school procedure. It is a form of State-sponsored religious education; in fact, according to the Regents, its purpose is "teaching our children, as set forth in the Declaration of Independence, that Almighty God is their Creator" (1951 Statement of Belief) and "will give to the student an understanding and appreciation of his role as an individual endowed by his Creator * * * and of reverence for Almighty God." It would thus "fulfill its

[the school's] high function of supplementing the training of the home" (Fundamental Beliefs, Regents Recommendations, adopted March 25, 1955). This requirement falls squarely within the categories of disability accounting for the decisions in *Everson* and *McCollum* (*supra*): use of public school classrooms during regular school hours, limitation of participation to those children whose parents consent and, in addition, being led by a teacher or by a person designated by the teacher. Under such announced purpose and method of performance, it cannot be less than instruction contrary to the establishment and freedom clauses, nor can the requirement be excused on the theory that the saying of the prayer—although conducted in the presence of the student body in the assembly hall of the classroom—is nonetheless a voluntary act, since no child is "required or encouraged to join in said prayer against his or her wishes" (Answering Affidavit), or on the theory that during the saying the child may remain silent, leave the room or report late. This is no answer, for it contains the very elements the prayer is supposed to eliminate: divisiveness, a type of compulsion, exerting as it does a pressure which an immature child is unable to resist because of his inherent desire to conform, and constituting a subtle interference by the State with the religious freedom guaranteed by the First Amendment. As Mr. Justice FRANKFURTER so aptly phrased it: "Separation means separation, not something less * * *. The public school is at once the symbol of our democracy and the most pervasive means for promoting our common destiny. In no activity of the State is it more vital to keep out divisive forces than in its schools, to avoid confusing, not to say fusing, what the Constitution sought to keep strictly apart." (*McCollum, supra*, p. 231.)

[fol. 152] The mere circumstance that the children of these petitioners may constitute a minority is no justification for rejecting their petition. The guarantees of the Bill of Rights, of which the First Amendment is the very cornerstone, were designed to protect minorities, which include diverse religious sects and atheists. While majority rule is an accepted incident of the political aspects of the democratic process, nothing in the Bill of Rights permits imposing the will of a majority—even in the slightest degree—

upon an objecting minority, contrary to its protective cloak (*Torcaso* v. *Watkins, supra; Board of Educ.* v. *Barnette*, 319 U. S. 624). The very fact that the school board is charged with the duty of educating the young who are compelled to attend public school, except in certain instances not presently pertinent (Education Law, §3212), is reason enough to observe scrupulously the establishment and freedom clauses here invoked. What was said in *McCollum* is appropriate here: "We renew our conviction that 'we have staked the very existence of our country on the faith that complete separation between the state and religion is best for the state and best for religion.' *Everson* v. *Board of Education*, 330 U. S. at 59. If nowhere else, in the relation between Church and State, 'good fences make good neighbors.'" (*McCollum, supra*, p. 232.)

The sponsors of the Regents prayer claim that it is nonsectarian in nature, a simple statement acknowledging the existence of and our dependence upon a Supreme Being; that such reference is of much the same character as the reference to God in various holiday programs (i.e., Christmas, Easter, Thanksgiving Day), in various official oaths, in invocations and benedictions said at most public gatherings, at meetings of some official bodies as well as in the inscription of the motto "In God We Trust" on coins, stamps and bank notes. Although these references may well be regarded as a permissible illustration that we are a religious people (cf. *Zorach* v. *Clauson, supra*), it does not follow that the Regents prayer is beyond the reach of the First Amendment. Such an approach belies the avowed purpose of the Regents which, as we have pointed out, was to commence "teaching our children" (Statement of Belief). In our view, this conflicts with the establishment clause which, under the Fourteenth Amendment, applies to the State—and Boards of Education are not excepted (*Board of Educ.* v. *Barnette, supra*). While the *Barnette* case dealt with the punitive consequences of noncompliance, the United States Supreme Court again made it clear that "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their

[fol. 153] faith therein" (p. 642). The pledge of allegiance was neither designed nor intended for other than a patriotic purpose; yet, as applied to children who were expelled for refusal to comply because of religious scruples and whose absence thereby became unlawful, subjecting them and their parents or guardians to punishment was held unenforcible as to them. Under the Federal Constitution, it employed an impermissible means of achieving "national unity". "Compulsory unification of opinion", as Mr. Justice JACKSON in his illimitable forthrightness said (p. 641), "achieves only the unanimity of the graveyard." The inculcation of religion is a matter for the family and the church. In sponsoring a religious program, the State enters a field which it has been thought best to leave to the church alone. However salutary the underlying purpose of the requirement may be, it nonetheless gives to the State a direct supervision and influence that overstep the line marking the division between church and State and cannot help but lead to a gradual erosion of the mighty bulwark erected by the First Amendment. This does not mean that the State is or should be hostile to religion—merely that the State should not invade an area where the constitutionally protected freedom is absolute and not open to the vicissitudes of legislative or judicial balancing.

The order appealed from should be reversed and the prayer of the petitioners should be granted, directing the Board of Education of Union Free School District Number Nine, New Hyde Park, to discontinue the saying of the Regents prayer in the schools within its district.

Judge FOSTER concurs with Chief Judge DESMOND; Judge FROESSEL concurs in an opinion in which Judge VAN VOORHIS concurs; Judge BURKE concurs in a separate opinion, Judge DYE dissents and votes to reverse in an opinion in which Judge FULD concurs.

Order affirmed.

[fol. 154] Triple Certificate to foregoing paper (omitted in printing).

[fol. 155]

IN THE COURT OF APPEALS OF THE STATE OF NEW YORK

• • • • • • •

Witness,

THE HONORABLE CHARLES S. DESMOND,
Chief Judge, Presiding.

RAYMOND J. CANNON, *Clerk.*

[fol. 156]

No. 456

In the Matter of

the Application of STEVEN I. ENGEL, & ors., Appellants,

vs.

WILLIAM J. VITALE, JR., & ors., constituting the Board of Education of Union Free School District Number Nine, New Hyde Park, New York, Respondents,

directing them to discontinue a certain school practice,

and

HENRY HOLLENBERG, & ors., Intervenors-Respondents.

REMITTITUR—July 7, 1961

Be It Remembered, That on the 24th day of December in the year of our Lord one thousand nine hundred and sixty, Steven I. Engel, & ors., the appellants in this cause, came here unto the Court of Appeals, by Butler, Jablow & Geller, their attorneys, and filed in the said Court a Notice of Appeal and return thereto from the order of the Supreme Court, Nassau County. And William J. Vitale, Jr., & ors., constituting the Board of Education of Union Free School District Number Nine, New Hyde Park, New York, the respondents, and Henry Hollenberg, & ors., the intervenors-respondents in said cause, afterwards appeared in said

Court of Appeals by Gunn, Neier & Daiker, and Hahn, Hahn & Ford, their respective attorneys.

Which said Notice of Appeal and the return thereto, filed as aforesaid, are hereunto annexed.

[fol. 157] Whereupon, The said Court of Appeals having heard this cause argued by Mr. William J. Butler, of counsel for the appellants, and by Mr. Bertram B. Daiker, of counsel for the respondents, and by Mr. Porter R. Chandler, of counsel for the intervenors-respondents, briefs filed by amici curiae, and after due deliberation had thereon, did order and adjudge that the order appealed from herein be and the same hereby is affirmed, without costs.

And it was also further ordered, that the records aforesaid, and the proceedings in this Court, be remitted to the Supreme Court of the State of New York, there to be proceeded upon according to law.

[fol. 158] Therefore, it is considered that the said order be affirmed, without costs, as aforesaid.

And hereupon, as well the Notice of Appeal and return thereto aforesaid as the judgment of the Court of Appeals aforesaid, by it given in the premises, are by the said Court of Appeals remitted into the Supreme Court of the State of New York before the Justices thereof, according to the form of the statute in such case made and provided, to be enforced according to law, and which record now remains in the said Supreme Court, before the Justices thereof, &c.

Raymond J. Cannon, Clerk of the Court of Appeals of the State of New York.

Court of Appeals, Clerk's Office, Albany, July 7, 1961.

Clerk's Certificate to foregoing transcript (omitted in printing).

[fol. 159]

At a Special Term Part II of the Supreme Court held in and for the County of Nassau, at the Court House in Mineola, New York, on the 23rd day of October, 1961 at 33 Willis Ave., Mineola, N. Y.

Present: Hon. Mario Pittoni, Justice.

#1824/1959

In the Matter of the Application of

STEVEN I. ENGEL, DANIEL LICHTENSTEIN, MONROE LERNER, LENORE LYONS and LAWRENCE ROTH, Petitioners-Appellants,

—against—

WILLIAM J. VITALE, JR., PHILIP J. FREED, MARY HARTE, ANNE BIRCH and RICHARD SAUNDERS, constituting the Board of Education of Union Free School District Number Nine, New Hyde Park, New York, Respondents-Respondents,

directing them to discontinue a certain school practice

and

HENRY HOLLENBERG, ROSE LEVINE, MARTIN ABRAMS, HELEN SWANSON, WALTER F. GIBB, JANE EHLEN, RALPH B. WEBB, VIRGINIA ZIMMERMAN, VIRGINIA DAVIS, VIOLET S. COX, EVELYN KOSTER, IRENE O'ROURKE, ROSMARIE PETELENZ, DANIEL J. REEHIL, THOMAS DELANEY and EDWARD L. MACFARLANE, Intervenor-Respondents-Respondents.

[fol. 160]

ORDER—October 23, 1961

The above named Petitioners-Appellants, having appealed to the Court of Appeals from the final order of the Supreme Court of the State of New York, County of Nassau, entered in the Office of the Clerk of the County of

Nassau on the 17th day of March, 1961; and from an interlocutory order of the Appellate Division of the Supreme Court, Second Department, entered in the office of the Clerk of that court on October 17, 1960, affirming the interlocutory order herein of the Supreme Court, County of Nassau, entered in the Office of the Clerk of the County of Nassau on October 5, 1959; and the Court of Appeals having heard said appeal and ordered and adjudged that the order so appealed from be affirmed without costs, and the remittitur of the Court of Appeals having been duly filed in the Office of the Clerk of the County of Nassau on the 19th day of July, 1961;

Now on reading and filing the remittitur from the said Court of Appeals herein, and on motion of Gunn, Neier & Daiker, attorneys for the Respondents herein, it is

Ordered and Adjudged, that the order and judgment of said Court of Appeals be and the same hereby is made the order and judgment of this Court, without costs.

Enter,

Mario Pittoni, J.S.C.

Granted: October 23, 1961 Entered: October 23, 1961

Francis J. Anderson, County Clerk of Nassau County.

[fol. 161]

SUPREME COURT OF THE UNITED STATES

No. 468—October Term, 1961

STEPHEN I. ENGEL, et al., Petitioners,

vs.

WILLIAM J. VITALE, JR., et al.

ORDER ALLOWING CERTIORARI—December 4, 1961

The petition herein for a writ of certiorari to the Court of Appeals of the State of New York is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Court of Appeals

of the State of New York 424

—o—

In the Matter of the Application

of

STEVEN I. ENGEL, DANIEL LICHTENSTEIN, MONROE LERNER, LENORE LYONS and LAWRENCE ROTH,
Petitioners-Appellants,

against

WILLIAM J. VITALE, JR., PHILIP J. FREED, MARY HARTE, ANNE BIRCH and RICHARD SAUNDERS, constituting the Board of Education of Union Free School District Number Nine, New Hyde Park, New York, 425
Respondents-Respondents,

directing them to discontinue a certain school practice,

and

HENRY HOLLENBERG, ROSE LEVINE, MARTIN ABRAMS, HELEN SWANSON, WALTER F. GIBB, JANE EHLEN, RALPH B. WEBB, VIRGINIA ZIMMERMAN, VIRGINIA DAVIS, VIOLET S. COX, EVELYN KOSTER, IRENE O'ROURKE, ROSEMARIE PETELENZ, DANIEL J. REEHIL, THOMAS DELANEY and EDWARD L. MACFARLANE, 426
Intervenor-Respondents-Respondents.

—o—

Additional Statement to the Court of Appeals

This is an appeal, pursuant to Sections 588 and 590 of the Civil Practice Act, from a final order of the Supreme Court, Nassau County, which dismissed appellants' petition and which was entered after the Appellate Division, Second

427 *Additional Statement to the Court of Appeals*

Department, had affirmed an interlocutory order of the Supreme Court, Nassau County. The interlocutory order had denied appellants' petition, but had remanded the matter to respondent Board of Education for proceedings as directed in the order.

The proceeding was brought pursuant to Article 78, of the Civil Practice Act, to compel respondents to cease the practice of the daily recitation of the so-called "Regents Prayer" in the public schools under the jurisdiction of the respondent
428 Board, on the grounds that such recitation violated the Federal and New York State Constitutions. The Supreme Court, Nassau County, declared that the daily recitation of the Regents Prayer in public schools was not unconstitutional, although it remanded the matter to the respondent Board with specific directions that procedures be taken to insure that the recitation was strictly voluntary and non-compulsory.

Although the Supreme Court, Nassau County, inserted in its order a clause granting appellants permission to appeal therefrom under Sec-
429 tion 1304 of the Civil Practice Act, the order was interlocutory rather than intermediate, since it determined the merits of the action and denied the relief requested in the petition.

The Appellate Division affirmed this interlocutory order, and appellants filed a notice of appeal from the order pursuant to Section 588, of the Civil Practice Act, under the theory that all the merits of the proceeding had been finally determined by the interlocutory order.

Subsequent to appellants' filing of the notice of appeal and record on appeal from the Appellate

Division's order of affirmance of the interlocutory order, the Supreme Court, Nassau County dismissed appellants' petition on the basis of the actions taken by respondent school board in response to the directions of the Supreme Court in its interlocutory order.

Appellants filed a notice of appeal from the final order to the Court of Appeals pursuant to Sections 590 and 588 of the Civil Practice Act, and the additional papers contained in this supplement are being submitted with the record on appeal filed in connection with the appeal from the interlocutory order, as the record on appeal herein. 431

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Notice of Appeal to Court of Appeals

SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF NASSAU

Index No. 1824/1959

In the Matter of the Application

of

434 STEVEN I. ENGEL, DANIEL LICHTENSTEIN, MONROE LERNER, LENORE LYONS and LAWRENCE ROTH,
Petitioners-Appellants,

against

WILLIAM J. VITALE, JR., PHILIP J. FREED, MARY HARTE, ANNE BIRCH and RICHARD SAUNDERS, constituting the Board of Education of Union Free School District Number Nine, New Hyde Park, New York,
Respondents-Respondents,

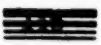
directing them to discontinue a certain school practice,

435 *and*

HENRY HOLLENBERG, ROSE LEVINE, MARTIN ABRAMS, HELEN SWANSON, WALTER F. GIBB, JANE EHLEN, RALPH B. WEBB, VIRGINIA ZIMMERMAN, VIRGINIA DAVIS, VIOLET S. COX, EVELYN KOSTER, IRENE O'ROURKE, ROSEMARIE PETELENZ, DANIEL J. REEHIL, THOMAS DELANEY and EDWARD L. MACFARLANE,
Intervenor-Respondents-Respondents.

Sirs:

PLEASE TAKE NOTICE, that pursuant to the provisions of Section 588 and Section 590, of the



Civil Practice Act, that the above-named Petitioners, Steven I. Engel, Daniel Lichtenstein, Monroe Lerner, Lenore Lyons and Lawrence Roth, hereby appeal to the Court of Appeals from the final order herein of the Supreme Court of the State of New York, County of Nassau, entered in the office of the Clerk of the County of Nassau, on the 17th day of March, 1961, and from each and every part of the said order, which order dismissed this proceeding on the merits pursuant to Section 1300 of the Civil Practice Act, and which order was entered after the entry of an 437 interlocutory order of the Appellate Division of the Supreme Court, Second Department, in the office of the Clerk of that court on October 17, 1960, affirming so much of the interlocutory order herein of the Supreme Court, County of Nassau, entered in the office of the Clerk of the County of Nassau on October 5, 1959, as denies the petition herein, denies the petitioners' demand for a jury trial, and remands the matter to the Respondent Board of Education for further proceedings, and the said petitioners shall bring up for review upon this appeal, the said interlocu- 438 tory order of the Appellate Division, Second Department, and each and every part thereof.

Dated: New York, March 31, 1961.

Yours, etc.,

BUTLER, JABLOW & GELLER
Attorneys for Petitioners-
Appellants
400 Madison Avenue
New York 17, New York

439 *Notice of Appeal to Court of Appeals*

To:

Clerk of the County
of Nassau
Mineola, New York

Gunn, Neier & Daiker, Esqs.
Attorneys for Respondents-
Respondents
49 Main Street
Port Washington, New York

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Hahn, Hahn & Ford, Esqs.
Attorneys for Intervenor-
Respondents-Respondents
117 Pennsylvania Avenue
Brooklyn 7, New York

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Final Order Appealed From

At a Special Term of the Supreme Court, Part I held in and for the County of Nassau on the 17th day of March, 1961.

Present:

HON. BERNARD S. MEYER,
Justice.

[SAME TITLE]

443

On reading and filing the Order to Show Cause herein dated February 24th, 1961, and the affidavit of Philip J. Fried, sworn to February 21st, 1961, in support of respondent's motion for a final order pursuant to Section 1300 of the Civil Practice Act dismissing the within proceeding on the merits; and the affidavit of Thomas J. Ford, sworn to March 1st, 1961, in support thereof; and the affidavit of Stanley Geller, sworn to March 1st, 1961 in opposition thereto; and

444

This motion having come on to be heard before me on March 3, 1961, and after hearing Gunn, Neier & Daiker (Bertram B. Daiker and Wilford E. Neier, of counsel) attorneys for respondents, and Hahn, Hahn & Ford (Porter R. Chandler, Thomas J. Ford and Richard E. Nolan, of counsel), attorneys for intervenor-respondents, all in support of the aforementioned motion; and after hearing Butler, Jablow & Geller (William J. Butler, Stanley Geller and Peter B. Schwartzkopf, of counsel), attorneys for petitioners, in opposition thereto; and

445 *Final Order Appealed From*

It appearing to the Court that respondent has complied with the directions contained in the opinion of this Court in this proceeding dated August 24, 1959; and due deliberation having been had, it is

ORDERED that this proceeding be and is dismissed on the merits, pursuant to Section 1300 of the Civil Practice Act.

Enter:

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BERNARD S. MEYER,
J. S. C.

Granted
Mar. 17, 1961

FRANCIS J. ANDERSON
Clerk

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448

Order to Show Cause

SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF NASSAU

[SAME TITLE]

On reading the affidavit of Philip J. Fried, sworn to February 21, 1961, and sufficient cause therefor appearing, it is 449

ORDERED that petitioners and intervenor-respondents show cause at a Special Term Part I of this Court to be held at the County Courthouse, 33 Willis Avenue, Mineola, New York, on the 3rd day of March, 1961 at 10:000 o'clock in the forenoon or as soon thereafter as counsel may be heard why a final order should not be made and entered pursuant to Section 1300 of the Civil Practice Act dismissing this proceeding on the merits; and it is further

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ORDERED, that service of a copy of this order and of the papers on which it is granted made on the attorneys for petitioners and on the attorneys for intervenor-respondents on or before the 28th day of February, 1961 at 5:00 o'clock in the afternoon, shall be sufficient.

Dated: Mineola, New York
February 24, 1961.

WILLIAM R. BRENNAN, JR.,
Justice of the Supreme Court
of the State of New York.

451

Affidavit of Philip J. Fried, Read in Support of Motion

SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF NASSAU

[SAME TITLE]

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452 STATE OF NEW YORK }
COUNTY OF NASSAU } ss.:

PHILIP J. FRIED, being duly sworn, deposes and says:

1. He is a respondent in this proceeding and is the duly elected President of the Board of Education of Union Free School District No. Nine, New Hyde Park, New York and has served in that capacity since July 1, 1960, prior to which date, he served as a member of said Board. By reason thereof, he is fully familiar with the facts
453 and circumstances of this proceeding and with the actions taken by said Board to comply with the directions of this Court, embodied in the opinion of Mr. Justice Meyer rendered at Special Term on August 24, 1959.

2. The aforementioned opinion directed:

(a) that the resolution of the Board dated July 8, 1958 be modified by the establishment of a procedure:

> "* * * whereby the parents of each child are advised of the adoption of the resolution calling for the saying of prayer, of the wording of the prayer and of the procedure to be

followed when it is said and requested to indicate whether the child shall or shall not participate in the exercise."

(b) that appropriate regulations be adopted by the Board:

"* * * making clear that neither teachers nor any other school authority may comment on participation or non-participation in the exercise nor suggest or require that any posture or language be used or dress be worn or be not used or not worn." 455

(c) that appropriate provision be made for non-participants in the prayer exercise, the nature of such regulations being left to the informed judgment of the Board.

3. On September 3, 1959, the Board duly adopted and promulgated the following regulations in accordance with the aforementioned directions:

"Regulations Regarding the School Prayer Adopted by the Board of Education on September 3, 1959 456

In implementation of instructions heretofore issued in connection with the daily recitation of the Regents Prayer at the opening of each school day, as adopted on July 8, 1958, the following regulations are adopted by the Board of Education:

1. Neither teachers nor any school authority shall comment on participation or non-participation in the exercise nor suggest or request that any posture or language be used or dress be worn or be not used or not worn.

457 *Affidavit of Philip J. Fried*

2. Provision is to be made for those children who are to be excused from participating or from the room during the prayer exercise.

3. Any child may be excused on written request of the parent or legal guardian and all parents will be so advised that the request should be so made, addressed to the principal of the school which the child attends."

458 4. In implementation of the aforementioned regulations, the Board issued the following letter to each parent and taxpayer within the School District:

"Board of Education
Union Free School District No. 9
New Hyde Park, New York

September 8, 1959

Dear Parent and Taxpayer:

Opening exercises at the commencement of
459 our school day include the Regents Prayer, adopted by the Board of Education on July 8, 1958, which reads:

'Almighty God, we acknowledge our dependence upon Thee, and we beg Thy blessings upon us, our parents, our teachers and our Country.'

Any parent or guardian who does not wish his child to say the prayer is requested to write a letter to the principal of the school his child attends, indicating whether he wants his child excused from the room or to remain

silent in the room while the prayer is being said.

Sincerely yours,

Lester G. Peck
Principal of the District."

5. These regulations and the procedures established pursuant to them have been in effect within the District at all times since September, 1959.

6. All requests from parents or guardians that children be excused from participating in the 461
recitation of the Regents Prayer have been promptly honored by the Board. The Board has received no request that children be excused from the classroom during the recitation of the Prayer. Inasmuch as there are seven schools in the District, each with different facilities available and different starting times, it has been considered preferable to defer any decision with respect to the exact provision to be made for any such children until such a request is made and the situation as presented in the school or schools involved can be properly evaluated. At that time 462
the Board of Education stands ready to make provision in accordance with the Court's decision.

7. No previous request for this or any similar relief has been made to any court or judge.

WHEREFORE, it is respectfully requested that this Court enter a final order dismissing this proceeding on the merits, pursuant to Section 1300 of the Civil Practice Act.

PHILIP J. FRIED.

(Sworn to February 21, 1961.)

463

Affidavit of Thomas J. Ford, Read in Support of Motion

SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF NASSAU

[SAME TITLE]

---

464 STATE OF NEW YORK }
COUNTY OF NASSAU } ss.:

THOMAS J. FORD, being duly sworn, deposes and says:

1. That he is a member of the law firm of Hahn, Hahn & Ford, attorneys for the intervenor-respondents, and that your deponent is fully familiar with all the facts and circumstances herein.

2. Your deponent has read the affidavit of
465 respondent, Philip J. Fried, now the duly elected President of the Board of Education of Union Free School District Number Nine, New Hyde Park, New York, sworn to the 21st day of February, 1961, and submitted herein in support of the motion for an order dismissing this proceeding on the merits.

3. In behalf of the intervenor-respondents, we respectfully join with the respondent School Board in requesting the relief sought.

THOMAS J. FORD.

(Sworn to March 1, 1961.)

466

Affidavit of Stanley Geller, Read in Opposition to Motion

SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF NASSAU

[SAME TITLE]

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.: 467

STANLEY GELLER, being duly sworn, deposes and says that:

I am a member of the firm of Butler, Jablow & Geller, attorneys for petitioners in this proceeding, and I submit this affidavit in opposition to respondents' motion for a final order dismissing the petition herein, based on certain actions alleged to have been taken by respondents after the subject matter of this proceeding was remanded to them by prior order of this Court.

468 Petitioners do not take the position that the actions alleged in respondents' motion papers to have been taken by respondents since remand have not been taken. Their opposition to the present motion is more fundamental.

Petitioners maintain that the saying of the so-called "Regents' Prayer" in the schools of Union Free School District No. 9, New Hyde Park, New York, at the direction and under the auspices of the respondents, constituting the Board of Education of that School District, violates the Constitutions of both this State and the United States,

469 for the reasons set forth in the petition herein and in the memoranda previously submitted to this Court. They maintain that the matter of the Prayer is not within the cognizance of the Board, and should not have been remanded to respondents for further consideration or action. They do not believe, therefore, that any actions taken by respondents on remand could have cured the fatal defect in the saying of the Prayer, as aforesaid.

Indeed, petitioners submit that any actions
470 taken by respondents since remand constitute an additional violation or additional violations of the State and Federal Constitutions.

STANLEY GELLER.

(Sworn to March 1st, 1961.)

471

472

Stipulation Waiving Certification of Record to Court of Appeals

IT IS HEREBY STIPULATED AND AGREED by and between the attorneys for the respective parties hereto that the foregoing are true and correct copies of the Papers on Appeal to the Appellate Division, Second Department; the Final Order Appealed From, the Order to Show Cause, the Affidavit of Philip J. Fried, the Affidavit of Thomas J. Flood, all in support of the motion and the Affidavit of Stanley Geller, in opposition to the motion and the Notice of Appeal to the Court of Appeals, all of which are on file in the office of the Clerk of the County of Nassau.

473

Certification of all of the foregoing papers is hereby waived.

Dated: New York, May , 1961.

BUTLER, JABLOW & GELLER,
Attorneys for Petitioners-Appellants.

GUNN, NEIER & DAIKER,
Attorneys for Respondents-Respondents.

474

HAHN, HAHN & FORD,
Attorneys for Intervenor-Respondents-Respondents.

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JAMES R. BROWNING, Clerk

Supreme Court of the United States

October Term, 1961

No. 468

In the Matter of the Application

of

STEVEN I. ENGEL, DANIEL LICHTENSTEIN, MONROE LERNER, LENORE LYONS and LAWRENCE ROTH,

Petitioners-Appellants,

against

WILLIAM J. VITALE, JR., PHILIP J. FREED, MARY HARTE, ANNE BIRCH and RICHARD SAUNDERS, constituting the Board of Education of Union Free School District Number Nine, New Hyde Park, New York,

Respondents-Respondents,

directing them to discontinue a certain school practice,

and

HENRY HOLLENBERG, ROSE LEVINE, MARTIN ABRAMS, HELEN SWANSON, WALTER F. GIBB, JANE EHLEN, RALPH B. WEBB, VIRGINIA ZIMMERMAN, VIRGINIA DAVIS, VIOLET S. COX, EVELYN KOSTER, IRENE O'ROURKE, ROSEMARIE PETELENZ, DANIEL J. REEHIL, THOMAS DELANEY and EDWARD L. MACFARLANE,

Intervenors-Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

WILLIAM J. BUTLER and
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BUTLER, JABLOW & GELLER,
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Supreme Court of the United States

October Term, 1961

No.

In the Matter of the Application

of

STEVEN I. ENGEL, DANIEL LICHTENSTEIN, MONROE LERNER, LENORE LYONS and LAWRENCE ROTH,

Petitioners-Appellants,

against

WILLIAM J. VITALE, JR., PHILIP J. FREED, MARY HARTE, ANNE BIRCH and RICHARD SAUNDERS, constituting the Board of Education of Union Free School District Number Nine, New Hyde Park, New York,

Respondents-Respondents,

directing them to discontinue a certain school practice,

and

HENRY HOLLENBERG, ROSE LEVINE, MARTIN ABRAMS, HELEN SWANSON, WALTER F. GIBB, JANE EHLEN, RALPH B. WEBB, VIRGINIA ZIMMERMAN, VIRGINIA DAVIS, VIOLET S. COX, EVELYN KOSTER, IRENE O'ROURKE, ROSEMARIE PETELENZ, DANIEL J. REEHIL, THOMAS DELANEY and EDWARD L. MACFARLANE,

Intervenors-Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

To the Honorable Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Steven I. Engel, Daniel Lichtenstein, Monroe Lerner, Lenore Lyons and Lawrence Roth, petitioners in this proceeding, pray that a writ of certiorari be issued to review

the judgment of the Court of Appeals of the State of New York, announced on July 7, 1961, which affirmed the final order of Special Term, Supreme Court of the State of New York, County of Nassau, entered on March 17, 1961, dismissing the proceeding in the said Special Term on the merits. The final order was entered after the entry of an order of the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department, affirming so much of an interlocutory order of the said Special Term, entered on October 5, 1959, as denied the petition herein, denied petitioners' demand for a jury trial, and remanded the matter to respondents for further proceedings.

Opinions Below

The basic decision involved in this application is the initial interlocutory order of Special Term, Nassau County, the opinion in which is reported in 18 Misc. 2d 659, 191 N. Y. S. 2d 453, and is also annexed to this petition in Appendix A, beginning at page 23. The interlocutory order denied the relief requested in the petition herein, that Special Term direct respondents to discontinue the saying of what is sometimes hereinafter referred to as the "Regents' Prayer", or simply the "Prayer", in the public schools of Union Free School District No. 9, New Hyde Park, New York. The interlocutory order, however, remanded the matter to responednts for further proceedings which, briefly stated, would ensure that the saying of the Prayer in the aforementioned schools was not "compulsory" in the sense indicated in the above-cited opinion of Special Term, Nassau County.

The Appellate Division, Second Department, unanimously affirmed the interlocutory order. Four of the five Justices of that Court concurred in a brief *per curiam* opinion in which they expressed their agreement with the views in the opinion of Special Term, Nassau County, and

the fifth Justice wrote a separate opinion in which he concurred in part and dissented in part from the *per curiam* opinion. The opinions of the Appellate Division, Second Department, are reported at 11 App. Div. 2d 340, 206 N. Y. S. 2d 183, and are annexed to this petition in Appendix A, beginning at page 75.

Subsequent to the entry of the order of the Appellate Division, Second Department, on the basis of certain actions allegedly taken by respondents in accordance with the remand provisions of the interlocutory order of Special Term, Nassau County, and on the motion of respondents, Special Term issued a final order dismissing the petition herein. Pursuant to Sections 588 and 590 of the Civil Practice Act of the State of New York, petitioners appealed from that final order directly to the Court of Appeals, and thereby brought up for review the order of the Appellate Division, Second Department (affirming the interlocutory order of Special Term, Nassau County) and the questions raised in the interlocutory proceeding.

The Court of Appeals, by a vote of 5 to 2, affirmed the final order of Special Term, Nassau County, and thereby upheld the order of the Appellate Division, Second Department, affirming the interlocutory order of Special Term. The majority in the Court of Appeals delivered three separate opinions, and the minority one opinion. Those opinions are reported at 10 N. Y. 2d 174, 182 N. Y. S. 2d 659, and are annexed to this petition in Appendix A, beginning at page 88.

Jurisdiction of This Court

The judgment of the Court of Appeals was announced on July 7, 1961. The remittitur of the Court of Appeals is annexed to this petition as Appendix B. Respondents have not yet entered judgment on the remittitur in the office of the Clerk of Nassau County.

Jurisdiction to review the judgment of the Court of Appeals is conferred on this Court by Title 28, U. S. C., Section 1254.

Questions Presented

1. Is not the practice of saying one specific religious prayer, composed by State officials, as a daily procedure, at the commencement of each school day, in all the public schools of a local school district, pursuant to a resolution of the local school board and under the direction of the regular public school teachers, a violation of the First and Fourteenth Amendments to the United States Constitution?

2 Is not the decision of the Court of Appeals of the State of New York, entered on July 7, 1961, and reported in 10 N. Y. 2d 174, 182 N. Y. S. 2d 659, in violation of the First and Fourteenth Amendments to the United States Constitution and in conflict with the prior decisions of this Court in *Everson* v. *Board of Education*, 330 U. S. 1, *McCollum* v. *Board of Education*, 333 U. S. 203, and *Zorach* v. *Clausen*, 343 U. S. 306, particularly the last two decisions?

Constitutional and Statutory Provisions Involved

The opening words of the First Amendment to the United States Constitution are as follows:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; * * *."

The first section of the Fourteenth Amendment to the United States Constitution is as follows:

> "Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or

> enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

The resolution of respondents involved in this proceed- was adopted on July 8, 1958. The minutes of the meeting of respondents on that date show the following:

> "Mrs. Harte moved, seconded by Mr. Saunders, that the regents prayer be said daily in our schools. Motion carried by majority vote, Mr. Fried voted 'nay'.
>
> "The Board of Education gave direction to the District Principal that this be instituted as a daily procedure to follow the salute to the flag."

The so-called "Regents Prayer" is contained in a Statement of Belief adopted by the Board of Regents of the State of New York on November 30, 1951, and is as follows:

> "Almighty God, we acknowledge our dependence upon Thee, and we beg Thy blessings upon us, our parents, our teachers and our Country."

Neither the resolution of respondents nor the Prayer is officially reported. The resolution is printed at folios 118-121 of the record below; the Prayer, at folio 84 of the record.

Statement of the Case

1. The Facts

The "facts" of this case must be adduced from pleadings and affidavits rather than testimony. There was no hearing or trial before Special Term, Nassau County, merely an oral argument of respondents' motion to dismiss the petition based on the pleadings and the affidavit of the respondent Vitale. Since the facts must be taken from

those papers—and apparently were taken therefrom by the New York courts—the contents of the papers will be reviewed here briefly.

(a) The Petition

The petition begins by stating that petitioners are residents and taxpayers of Nassau County and parents of children attending the public schools in Union Free School District No. 9, New Hyde Park, New York (hereinafter sometimes called the "District")—specifically, nine children in four schools (32-36).* It further states that two petitioners and their four children are members of the Jewish faith; one petitioner and her three children are members of the Unitarian Church; one petitioner and his child are members of the Society for Ethical Culture; and one petitioner and his two children are non-believers (36).

After identifying respondents, reciting the Prayer in full, and describing the procedure by which the saying of the Prayer was instituted in the District, the petition describes the manner and setting in which the Prayer is said in the schools of the District (36-42). It points out that, pursuant to the resolution adopted by respondents, the Prayer is said aloud in each class as a daily procedure, following the Salute to the Flag, and the participants are led by the regular teacher of the class or by a student selected by the teacher (42).

Petitioners believe that the critical allegations of fact in the petition are in Paragraphs 11 to 16, inclusive, which, in brief, state the following:

Paragraph 11: The procedure of saying the Prayer entails the use of the public school system of the District (43).

Paragraph 12: The Prayer is contrary to the respective religions of petitioners and their children who are believers

* References are to folios of the record printed for the use of the Court of Appeals.

and of a substantial number of other parents of children in the schools of the District and their children who are believers (43-44).

Paragraph 13: The Prayer is contrary to the beliefs concerning religion of petitioner and his children who are non-believers and of other parents of children in the schools of the District and their children who are non-believers (44-45).

Paragraph 14: The saying of the Prayer necessarily results in the exercise of coercion on children attending the schools of the District to participate in the saying thereof (45-46).

Paragraph 16: The saying of the Prayer favors belief in religion over non-belief (47).

The petition concludes by stating that the saying of the Prayer violates the Federal and State Constitutions, and that respondents have refused, despite petitioners' demand, to discontinue the saying of the Prayer (48-52).

Annexed to the petition and expressly made a part thereof is the Statement of Belief made by the Board of Regents in 1951, and hereinabove referred to (54, 82-87).

(b) The Answer of Respondents

The answer of respondents admits that petitioners are residents of Nassau County; that respondents constitute the Board of Education of the District; that the Prayer is accurately set forth in the petition; that respondents did direct the Prayer to be said, and the Prayer is said, aloud, each morning at the commencement of each class in each school of the District; and that, despite petitioners' demand, respondents have refused to discontinue the saying of the Prayer in the schools of the District (55-60).

In addition to a general denial, the answer of respondents contains seven separate affirmative defenses (60-68), but, since the interlocutory order of Special Term, Nassau

County, dismissed all of those defenses, and since the order was never appealed from by respondents, the defenses no longer raise any issue.

Finally, in connection with their general denial, respondents refer to various documents which are annexed to the affidavit of respondent Vitale submitted in support of respondents' motion to dismiss the petition. Those documents include the Statement of Belief of the Board of Regents, a Supplemental Statement of the same Board, adopted in 1955, four years after the original Statement of Belief, and the resolution adopted by respondents in connection with the Prayer on July 8, 1958 (57-58, 82-121).

(c) The Answer of Intervenors

The answer of intervenors admits only that respondents constitute the Board of Education of the District, that the Prayer is said daily, following the Salute to the Flag, at the commencement of class in each school of the District, and that it is said aloud (138).

(d) The Affidavit of Respondent Vitale

As hereinabove indicated, together with their answer, and in support of their motion to dismiss, respondents served an affidavit made by respondent Vitale, the Chairman of the Board of Education of the District (70-81).

The affidavit begins with references to the Statement of Belief of the Board of Regents, the Supplemental Statement of the Board and the resolution adopted by respondents on July 8, 1958 (73-76). The affidavit then alleges that respondents directed the District Principal that "no child was to be required or encouraged to join in said prayer against his or her wishes," although this direction does not appear in the minutes of the meeting held by respondents on July 8, 1958 (77). The affidavit also alleges that, since the institution of the Prayer in the schools of the District, only one request has been received to excuse a

child from participating in the Prayer, and that such request was "respected" (78). The indication is that the request was by the child's parents, rather than by the child (79).

The affidavit also states that the District consists of a senior high school, a junior high school and five elementary schools, with 4,294 pupils (77-78).

(e) The Reply

The reply of petitioners was directed to the affirmative defenses in the answer of respondents, which no longer raise any issue.

(f) The Findings of Fact of Special Term

The determining factor in the findings of fact made by Special Term, Nassau County (which were not disturbed by the lower appellate courts) seems to have been the affidavit of respondent Vitale. With some important exceptions, hereinafter discussed, all allegations in the petition which were not denied by respondent Vitale seem to have been accepted as true, even though denied in the answers of respondents and intervenors. All affirmative statements in the affidavit not subsequently denied in the reply also seem to have been accepted as true, even though controverted by the petition.

Assuming at this point that the procedure which Special Term seems to have followed to arrive at the facts herein is a proper procedure under the Civil Practice Act of the State of New York, the following are the critical facts of this case (195-199):

Petitioners are the parents of children in the schools of the District, and they and their children are members of various religious faiths, with the exception of the petitioner and his two children who are non-believers.

Respondents constitute the Board of Education of the District, who, by a 4-1 vote, passed the resolution of July

8, 1958, that the Prayer be said in the schools of the District as a daily procedure following the Salute to the Flag.

Respondents directed the District Principal that "no child was to be required or encouraged to join in said prayer against his or her wishes."

With the exception of petitioners and their children, by means of this proceeding, only one parent has asked that his child be excused from participating in the Prayer, and no child has made such request. (Petitioners state this as a "fact," though it can hardly be critical in light of this "test case.")

We now come to what are perhaps the most critical facts herein, and it becomes necessary to distinguish between what Special Term found on the basis of the papers before it, and what those papers actually contain.

Special Term found that the Prayer "is said aloud *at the commencement of the school day*, by each class in the classroom *in the presence of the teacher*" (197). Paragraph 10 of the petition herein, however, alleges that the Prayer is said aloud "each morning *at the commencement of each class.*" It also alleges that the Prayer is "*led by the teacher or by a student selected by the teacher*" (42).

As already stated, both the answers deny virtually all of Paragraph 10 of the petition, but both use the phrase "at the commencement of • • • class" instead of "at the commencement of the school day" (60, 138), and respondent Vitale, although he takes pains to deny all other details of the manner in which the Prayer is said, as alleged in the petition, does not deny that it is "led by the teacher or by a student selected by the teacher" (77, 79). Thus, there seems to be no justification at all for the finding by Special Term that the Prayer is said "at the commencement of the school day," instead of "at the commencement of • • • class," or the finding that the Prayer is said "in the presence of the teacher,"

instead of being "led by the teacher or by a student selected by the teacher."

In any event, this Court has repeatedly held that, in cases involving the First Amendment, it will not be bound by Findings of Fact by lower courts which are not justified by the record (*Finer* v. *U. S.*, 340 U. S. 315, 316, 322; *Niemetko* v. *Maryland*, 340 U. S. 368, 371; *Staub* v. *City of Baxley*, 355 U. S. 313, 318-19; *Allied Stores of Ohio* v. *Bowers*, 358 U. S. 522, 525).

The last, and probably the most important, finding of fact made by Special Term is that the Prayer is contrary to the beliefs of petitioners and their children (198-199). Although Paragraphs 12 and 13 of the petition, which contain this allegation, were denied in both answers, Special Term held that it could not inquire into the beliefs of petitioners unless the good faith of those beliefs were placed in issue, and Special Term further held that the matter of good faith was not placed in issue by a bare denial of the allegations in Paragraph 12 and 13 of the petition, presumably because the denial was not repeated and elaborated upon in the affidavit of respondent Vitale (201). Nevertheless, and despite the finding by Special Term that the Prayer is contrary to the beliefs of petitioners and their children, Special Term refused to make a finding of fact that the Prayer is "sectarian" as alleged in Paragraph 15 of the petition herein, and the lower court subsequently held as a matter of law (without citing any authority in support of such holding) that the Prayer is not sectarian (334-339).

Similarly, Special Term refused to make a finding of fact that the saying of the Prayer in the public schools of the District "necessarily resulted in the exercise of coercion upon the children of petitioners," as alleged in Paragraph 14 of the petition herein, although Special Term subsequently held, again as a matter of law, that certain aspects of the procedure surrounding the saying of the Prayer were compulsory and accordingly remanded the matter to respondents to cure those defects (314-317).

2. The Manner in Which the Federal Questions Were Raised

As can be seen from the statement above, the federal questions in this proceeding were raised by the first pleadings, and they dominated the proceedings in all the lower courts, almost to the exclusion of any other questions.

Special Term, Nassau County, devoted all but eight of the 66 pages of its opinion (as printed in the record below) to what it termed "The Constitutional Questions" (Appendix A, p. 33). Since Special Term had eliminated what it termed "The Procedural Questions," the Appellate Division, Second Department, considered only the federal questions. The majority per curiam opinion merely stated agreement "with the views expressed in the opinion of the learned Justice at Special Term" (Appendix A, p. 75), but the one separate concurring opinion is devoted entirely to setting forth another theory as to why the saying of the Prayer in the schools of the District should not be deemed a violation of the First Amendment to the United States Constitution, the Justice who wrote the opinion claiming to disagree with Special Term on that point (Appendix A, p. 76). All four opinions of the Court of Appeals are devoted entirely to the federal questions.

Reasons for Granting the Writ

Petitioners submit (1) that in this case the Court of Appeals of the State of New York has decided federal questions of great substance not heretofore specifically determined by this Court, or, in the alternative, (2) that the Court of Appeals has decided those questions in a way which is not in accord with applicable decisions of this Court.

1. The Federal Questions Herein Have Not Heretofore Been Specifically Determined by This Court

The basic question in this case would not seem to have ever come before this Court.

Prior cases before this Court which come closest to presenting a question similar to that in this case would seem to be *McCollum* v. *Board of Education*, 333 U. S. 203, *Zorach* v. *Clauson*, 343 U. S. 306, and *Doremus* v. *Board of Education*, 342 U. S. 429. The first two cited cases, however, involved a program of religious instruction, and the latter involved Bible-reading. Moreover, the *Doremus* appeal was dismissed as moot because, by the time the appeal reached this Court, the school children involved had graduated, and the appellants, who included the parents of the graduates and certain "taxpayers", were deemed to have no standing to prosecute the appeal.

Is a procedure consisting of the saying of a religious prayer in public schools different from a program of religious instruction? For the purposes of the United States Constitution, petitioners think not. Respondents and intervenors, on the other hand, have consistently argued that there is a fundamental difference. So did the majority of the Court of Appeals. The majority opinion written by the Chief Judge of the Court of Appeals says flatly that the saying of the prayer involved in this case, "is not 'religious education' • • • " (Appendix A, p. 89).

If respondents, intervenors and the majority of the Judges of the Court of Appeals are correct, if the procedure of saying the Prayer in this case cannot be equated with the program of religious instruction in the *McCollum* and *Zorach* cases, then the saying of the Prayer in the public schools of the District, at the very least, presents a question novel to this Court. The only remaining consideration under the first part of Rule 19(1)(a) of the Rules of

this Court would seem to be whether that question is one of substance. Petitioners submit that the question is of great substance.

(1) This Court has accorded special importance to the opening words of the Bill of Rights. Whereas the Court has adhered to the rule that the first eight Amendments to the Constitution are, generally speaking, not made directly applicable to State and local governments by the Fourteenth Amendment (*The Slaughterhouse Cases*, 16 Wall 36; *Hague* v. *C.I.O.*, 307 U. S. 496; *Palko* v. *Connecticut*, 302 U. S. 319; *Bartkus* v. *Illinois*, 359 U. S. 121), the Court has, nevertheless, treated the first clause of the First Amendment as if the prohibitions contained therein had been repeated in full in the Fourteenth, except, of course, for an appropriate substitution for the word "Congress." (*Cantwell* v. *Connecticut*, 310 U. S. 296; *Minersville District* v. *Gobitis*, 310 U. S. 586; *West Virginia State Board of Education* v. *Barnette*, 319 U. S. 624; *Everson* v. *Board of Education, supra; McCollum* v. *Board of Education, supra; Zorach* v. *Clausen, supra.*)

Apparently, the Court has done so because of the belief that the principles of separation of church and state and freedom of religion, set forth in the First Amendment, are, in the words of Mr. Justice Cardozo in the *Palko* case, *supra*, "implicit in the concept of ordered liberty" referred to in the Fourteenth Amendment.

(2) This Court has also given particular attention to questions affecting separation of church and state and freedom of religion in the field of *primary and secondary* school education (*Gobitis, Barnette, Everson, McCollum* and *Zorach* cases, *supra*). In this respect, the Court merely reflects a concern shared by enlightened opinion throughout our country.

Recently, President Kennedy requested the Secretary of Health, Education and Welfare to give an advisory

opinion on the constitutionality of proposed federal legislation concerning aid to education, primary and secondary. Mr. Ribicoff's subsequent opinion contained the following relevant passage (New York Times, March 29, 1961, p. 22):

> "The constitutional principles involved are obviously the same whether the subject is elementary and secondary school education or higher education, but the factual circumstances surrounding the application of the principles are dramatically different. The reasons are largely historical.
>
> "The history of education in the United States at the grammar and high school level is largely one of free public schools * * *.
>
> "The history of college and university education is almost precisely the opposite. While from a relatively early date the Federal and some state governments subsidized state universities and colleges, the bulk of advanced education has until recently been carried on by private institutions, the majority of which have a religious origin.
>
> "Primary schooling has long been accepted as essential for every American child, and secondary education is rapidly becoming recognized as almost equally a necessity. Attendance at a university or college, on the other hand, has always been a matter of individual decision, dictated or influenced by the circumstances and preferences of the individual child and his family. Even today fewer than [illegible] of the high school graduates enter college on a full-time basis, and of these 41 per cent are students in non-public institutions * * *.
>
> "There are thus important differences between school and college, not only in terms of history and tradition but also in terms of the compulsory nature of attendance. There are differences, too, from the standpoint of the national interest involved."

(3) The question in this case is of special importance because the Prayer is a special type of religious expression, different, perhaps, from any other prayer ever uttered in any school, private or public, in the history of this country.

It is not from the liturgy of any recognized religion. It was not even composed by persons who presumed to act with any ecclesiastic authority or in a religious capacity. It is an original prayer composed by laymen who are officials of a State government. It is, petitioners submit, a form of State Religion.

(4) The Prayer is not only unique in content and origin. The saying of the Prayer, or any prayer, for that matter, in the public schools of the District constitutes a radical innovation. The Statement of Belief of the Board of Regents, which announced the Prayer, appeared in 1951, only ten years ago. Even more important, the resolution of respondents introducing the Prayer in the schools of the District, was passed seven years after the Statement of Belief, and only three years ago. Before that, it is clear from the record below, there was no religious prayer or ceremony of any kind in the schools of the District. Thus, the Prayer represents a sharp break with the past, that first breach in the "wall" of separation of church and state which, if not repaired speedily and effectively, may endanger the entire constitutional basis of our religious liberty.

2. The Federal Questions Herein Have Been Decided Below in a Way Which Is Not in Accord With the Applicable Decisions of This Court

Above it was pointed out that petitioners, intervenors and a majority of the Judges of the Court of Appeals have taken the position that the Prayer does not constitute religious instruction, and thus the rule laid down in the *McCollum* and *Zorach* cases, *supra*, is inapplicable. Above, therefore, petitioners argued that the Prayer at least raises a question which is both novel and substantial.

The fact is, however, that the Prayer *is* religious instruction. The authors of the Prayer have so stated. The

learned Justice at Special Term, Nassau County, so found. Only one of four justices of the Appellate Division, Second Department, dissented from that finding; and, although the majority opinion of the Chief Judge of the Court of Appeals begins by disagreeing, it ends with an inadvertent, but nevertheless clear, expression of agreement.

The Statement of Belief of the Board of Regents introduces the Prayer in the following manner (83-84):

> "In our opinion, the securing of the peace and safety of our country and our State against such dangers points to the essentiality of *teaching* our children, as set forth in the Declaration of Independence, that Almighty God is their Creator, and that by Him they have been endowed with their inalienable rights of life, liberty, and the pursuit of happiness.
>
> "We believe that at the commencement of each school day the act of Allegiance to the Flag might well be joined with this act of reverence to God: 'Almighty God, we acknowledge our dependence upon Thee, and we beg Thy blessings upon us, our parents, our teachers and our country' " (Petitioners' italics).

The whole point of the Prayer, the Regents say, is to *teach* children that God is their Creator.

Despite such a clear expression by the authors of the Prayer, presumably experts in education and the highest authority on the subject in the State of New York, that the Prayer would serve as a form of religious education, the Chief Judge of the Court of Appeals at first concluded otherwise (see above, p. 13). The next to last paragraph of his opinion however, reads as follows (Appendix A, p. 91):

> "The motives and purposes of the Regents and of the local board are noble. *The success of the practice is problematical* but there is no problem of constitutionality" (Petitioners' italics).

What the learned Chief Judge clearly means is that he disagrees with the Regents that the Prayer will be success-

ful in its goal of teaching children that God is their Creator. Why speak of the "success" of a practice, unless there is a goal?

The Statement of Belief of the Regents states only what is obvious. Since prayer is the actual practice of religion, it is at the very least a form of religious instruction. It is learning by doing, the application of the maxim—"Practice makes perfect." It is, if anything, a higher or more intense form of religious experience.

Petitioners submit that if a program of religious instruction in public schools under the auspices of the public school system is unconstitutional, *a priori* a program of religious worship, which is the goal of such instruction, is unconstitutional.

Is a program of religious instruction in public schools under the auspices of the public school system unconstitutional? This Court, by a vote of 8-1, clearly answered that question in the affirmative in the *McCollum* case, and, although the Court qualified some of the broader implications of the *McCollum* decision in the *Zorach* case, it did not qualify that specific answer.

In the *McCollum* case, this Court held that the "released-time" program instituted by the Board of Champaign, Illinois, was unconstitutional. The Champaign program was one under which pupils in public schools, whose parents consented in writing, were given 30 to 45 minutes of religious instruction on public school premises, daily, during school hours, by teachers employed by religious organizations affiliated with the religious sects to which the pupils belonged. The teachers had to be approved by the public school superintendent, but, in the case of religious instruction in the dominant Protestant faith, they were frequently the regular public school teachers.

In the *Zorach* case, this Court held that the "released-time" program of the Board of Education of New York City is valid, but under the New York program the religious instruction is not given in the public schools or under the auspices of the public school system.

Two of the three majority opinions of the Court of Appeals in this case do not mention the *McCollum* case. The third, that of Judge Froessel, attempts, very briefly, to distinguish it as being limited to the holding that public school classrooms may not be "turned over to religious instructors" or to "a particular group to promote its own beliefs, doctrines, tenets and dogma" (Appendix A, p. 93).

The majority per curiam opinion of the Appellate Division, Second Department, does not mention the *McCollum* case, and the concurring opinion of Mr. Justice Beldock merely quotes from Mr. Justice Jackson's opinion on the lack of "compulsion" in the Champaign program (which did not prevent Mr. Justice Jackson from concurring with the *McCollum* decision that the program was unconstitutional). The opinion of Special Term, Nassau County, is perhaps the only one of the opinions below which discusses the *McCollum* case at any length, and the only one which discusses the *McCollum* and *Zorach* cases together, as, petitioners submit, they must be discussed if they are to be properly understood.

Special Term's conclusion was as follows (284-285):

> "The *Zorach* decision constitutes a retreat from both *Everson* and *McCollum* where *Everson's* broad dictum, reaffirmed in *McCollum*, outlawed aid to all religions, Zorach recognized that government can, without violation, accommodate all religions; where *McCollum* invalidated an alliance between religion and the compulsory education system, *Zorach* upheld the same alliance, for the same purpose, though in a different place."

The only Judge of the lower courts who considered the two decisions of this Court most in point came to the conclusion that the distinction between them was the *location* of the religious instruction. Petitioners submit that no other conclusion is possible.

Mr. Justice Douglas, who wrote the majority opinion of this Court in the *Zorach* case, distinguished the *McCollum* case as follows (343 U. S. 306, 315):

> "In the *McCollum* case *classrooms were used for religious instruction, and the force of the public school was used to promote that instruction.* Here, as we have said, the public schools do no more than to accommodate their schedules to a program of *outside* religious instruction." (Petitioners' italics.)

As if to emphasize that the *Zorach* decision went so far and no further, Mr. Justice Douglas warned that the decision stands only for the proposition that a school can "close its doors or suspend its operations as to those who want to repair to their religious sanctuary for worship or instruction" (343 U. S. 306, 314). Significantly, Mr. Justice Douglas not only joined "worship" with "instruction"; he placed "worship" first.

The rule which thus emerges from the *McCollum* and *Zorach* cases is as clear and practicable as it is salutary: Religious instruction (and *a priori* religious worship or prayer) may not be conducted inside public schools under the auspices of the public school system, although it may certainly be conducted elsewhere, and, *if so conducted*, may even be "accommodated" by such means as the shortening of the regular public school day. With this rule, petitioners submit, the procedure of saying the Prayer in the public schools of the District and the decision of the Court of Appeals of the State of New York in this case is in direct conflict.

Conclusion

In light of the foregoing, it is respectfully submitted that this petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

Supreme Court Decision

BERNARD S. MEYER, J. Does any provision of the United States or New York State Constitution invalidate a school board resolution directing that as a daily procedure, following the salute to the flag, the following prayer be said in the schools of the district: "Almighty God, we acknowledge our dependence upon Thee, and we beg Thy blessings upon us, our parents, our teachers and our Country"?

The attempt to find a commonly acceptable prayer is not new. Madison recorded "a project of a prayer, by Governor Livingston, father of the present Judge, intended to comprehend and conciliate college students of every Christian denomination, by a form composed wholly of texts and phrases of Scripture";[1] and Benjamin Franklin

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1. Letter to Edward Everett, March 19, 1823, reprinted in Blakely, American State Papers on Religion (1943), 592. The Governor Livingston referred to was William Livingston, the first governor of New Jersey, who while he lived in New York had been a member of the Committee of Trustees for the Lottery Fund, from which Fund, King's College (now Columbia University) was to be supported. In a series of newspaper articles, Livingston assailed the proposed college as an institution of the established church and pressed for a college under civil direction. He formulated his own plan under which "no religious profession in particular be established" and which would have prohibited any by-law relating to religion, except compulsion of church attendance on Sabbath. He urged that "the whole College be every morning and evening convened to attend public prayer * * *" and that such forms be prescribed and adhered to, as all Protestants can join in." When his opponents charged that no such prayer could be formulated, Livingston prepared and published in the *Independent Reflector* of Thursday, May 31, 1753, the prayer Madison mentions. It is reprinted in part in Pratt, Annals Of Public Education In New York—The Founding Of King's (Afterwards Columbia) College (1873), 224-225. The history of the controversy is detailed in Mahoney, The Relation Of The State To Religious Education In Early New York, 1633-1825 (1941), 74-76.

wrote his own more generalized version of the Lord's Prayer, with detailed explanation of the reasons for each change.[2] Nor is the problem of prayer in New York public schools novel. In a series of rulings beginning in 1837 and continuing until at least 1909, the Superintendent of Common Schools of the State of New York held that a "teacher might open his school with prayer, provided he did not encroach upon the hours allotted to instruction, and provided that the attendance of the scholars was not exacted as a matter of school discipline."[3] The rationale of the policy is most clearly stated by Superintendent Spencer, in a decision rendered May 13, 1839,[4] as follows:

"Both parties have rights; the one to bring up their children in the practice of publicly thanking their Creator for his protection, and invoking His blessing; the other of declining in behalf of their children, the religious services of any person in whose creed they may not concur, or for other reasons satisfactory to themselves. These rights are reciprocal, and should be protected equally; and neither should interfere with the other. Those who desire that their children should engage in public prayer have no right to compel other children to unite in the exercise, against the wishes of their parents. Nor have those who object to this time, place or manner of praying, or to the person who conducts the exercises, a right to deprive the other class of the opportunity of habituating their children to what they conceive an imperious duty. Neither the common school

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2. Cousins, In God We Trust (1958), pp. 21-23.

3. New York State Education Department, Superintendent of Common Schools Annual Report 1912-1913, Part 2, pp. 524-532. The quotation is from Orders And Decisions, 6:391, referred to at *ibid.*, p. 532. A decision by Superintendent Randall, dated October 27, 1853 in *Matter of Quigley*, not abstracted in the Annual Report, held that a teacher could not compel Catholic children to join in prayer or read the Bible.

4. Orders And Decisions, 8:87, abstracted in *op. cit., supra*, n. 3 p. 526.

system, nor any other social system, can be maintained, unless the conscientious views of all are equally respected. The simple rule, so to exercise your own rights as not to infringe on those of others, will preserve equal justice among all, promote harmony, and insure success to our schools. In the present case, the Superintendent thinks the trustees had lawful right to permit the teacher to commence the business of the day by public prayer, with the children of such parents as desired it; and they were also right in directing that such exercises should not take place during school hours, nor form a part of school discipline.

* * *

"And the teacher should allow the children of all parents who do not desire them to engage in prayer to withdraw from the room, or to absent themselves from it. But if they come into the room before the usual school hours, and choose to remain there during prayer, they must preserve the order and decorum befitting such an occasion."

In 1951 this policy was altered when the Board of Regents adopted a statement of belief recommending the prayer quoted above with the suggestion that "at the commencement of each school day the act of allegiance to the Flag might well be joined with this act of reverence to God."[5] Respondent school board having followed the Regents' recommendation and directed recital of the prayer, the question presented to this court is whether as a matter of power, rather than as a question of policy, it may legally do so? For the reasons hereafter set forth at length, it is concluded that the "establishment" clause of the Constitution does not prohibit the noncompulsory saying of the Regents' prayer in the public schools, but that the "free exercise" clause requires that respondent board take affirm-

5. The Regents Statement on Moral and Spiritual Training in the Schools, adopted November 30, 1951. On March 25, 1955, this statement was supplemented by The Regents' Recommendations for School Programs on America's Moral & Spiritual Heritage.

ative steps to protect the rights of those who, for whatever reason, choose not to participate.

The case arises as an article 78 proceeding, seeking an order in the nature of mandamus directing the respondent Board of Education of Union Free School District Number Nine, Town of North Hempstead, to discontinue use of the prayer. The five petitioners are taxpayers within the district and parents of children in schools of the district. Permission to intervene was asked by 16 taxpayer-parents who oppose the petition, and intervention was allowed pursuant to section 1298 of the Civil Practice Act, but limited in the court's discretion to the merits of the constitutional questions under applicable provisions of the United States Constitution and the Constitution of the State of New York. The State Board of Regents did not seek to intervene but asked and without objection was granted leave to file a brief *amicus curiae*. The action of the board which is questioned is the adoption on July 8, 1958 of a resolution "that the regents prayer be said daily in our schools" and the direction, at the same meeting, by the board "to the District Principal that this be instituted as a daily procedure to follow the Salute to the flag". The respondent Board of Education answered and moved to dismiss on a number of procedural grounds.

The Procedural Questions

First, it is claimed that since the matter "can be adequately reviewed by an appeal to a court or to some other body or officer", to wit—the Commissioner of Education, pursuant to section 310 of the Education Law, subdivision 4 of section 1285 of the Civil Practice Act precludes consideration of the instant petition. That section, however, is not controlling in a proceeding in the nature of mandamus "'to compel performance of a duty specifically enjoined by law' ",[6] nor even in what would normally be a discretion-

6. *Matter of Leonard* v. *Horton*, 278 App. Div. 62.

ary matter if a constitutional issue is involved.[7] It is, therefore, unnecessary to rule on petitioners' further contention that appeal to the Commissioner is not "adequate."[8]

The board next points to the fact that its resolution was adopted July 8, 1958, more than four months before the commencement (Jan. 22, 1959) of this proceeding, and says that the proceeding is, therefore, not timely brought. But since what is charged in the petition is a continuing failure to obey the requirements of the Federal and State Constitutions, and the proceeding was commenced within four months after the demand for discontinuance, it is within the time allowed by section 1286 of the Civil Practice Act.[9]

Third, the board argues that a question of constitutionality must be raised in a plenary action rather than a spe-

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7. *Matter of Ellis* v. *Dixon*, 118 N. Y. S. 2d 815, dismissed for failure to appeal to the Commissioner an article 78 proceeding seeking review of a School Board's refusal to permit use of the schoolhouse, normally a discretionary matter. The Appellate Division affirmed, 281 App. Div. 987 (motion for leave to appeal denied 306 N. Y. 981, cert. dismissed 349 U. S. 458) holding that "The proceeding was properly before the court" but that the facts alleged did not show a clear legal right in petitioners or a failure by respondents to perform a duty enjoined by law. The holding accords with the line of cases reviewed in Benjamin on Administrative Adjudication in New York, Vol. 4 (Report on Educ. Dept.), pp. 51-54, of which *Matter of O'Connor* v. *Emerson*, 196 App. Div. 807, affd. without opinion 232 N. Y. 561 is illustrative, to the effect that the availability of review by the Commissioner does not bar article 78 review of action involving an interpretation of a statute and which is in violation thereof.

8. The argument that the finality of the Commissioner's determination prevents judicial determination of the constitutional question, thus making appeal to the Commissioner inadequate, is no longer valid in view of *Matter of Ross* v. *Wilson*, 308 N. Y. 605, and *Matter of Ellis* v. *Allen*, 4 A D 2d 343, appeal dismissed 4 N Y 2d 693, motion for leave to appeal denied 4 N Y 2d 674, permitting review, despite section 310 of the Education Law, of a determination of the Commissioner involving a constitutional question.

9. *Matter of Cash* v. *Bates*, 301 N. Y. 258.

cial proceeding. This contention is based on the well-established rule that in a proceeding to review an application addressed to the discretion of an administrative body, petitioner is held to have conceded, for the purpose of the application, the constitutionality of the statute or ordinance under which the body acts.[10] But the application here is one involving performance of a constitutional duty, and that question is properly raised in an article 78 proceeding.[11]

Fourth, the board objects that petitioners are, in effect, seeking an injunction, which relief is not available in this proceeding. Of course, as the language of section 1284 ("'duty specifically *enjoined* by law'" [italics supplied]) and the name (mandamus) of the former procedure imply, article 78 procedures encompass relief which might be ordered by a mandatory injunction. That fact alone will not put outside the scope of article 78 proceedings an action, such as the present one, seeking to compel the board to obey the command of specific constitutional provisions, and thus within the express language of subdivision 3 of section 1284.[12]

Finally, it is claimed that the petition is defective and should be dismissed as a matter of law because it fails to allege (a) that the schools attended by petitioners' children are within the school district and under control of respondent board, and (b) facts which establish that the board failed to perform a duty enjoined by law. With respect to the allegation of control, petitioners sought at the hearing

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10. *Matter of Diocese of Rochester* v. *Planning Bd. of Town of Brighton*, 1 N Y 2d 508, 519, 520.

11. *People ex rel. Ferguson* v. *Vroman*, 101 Misc. 233, affd. 180 App. Div. 914, revd. 222 N. Y. 586; *Matter of McCabe* v. *Voorhis*, 243 N. Y. 401; 22 Carmody-Wait, New York Practice, p. 200.

12. *Lewis* v. *Board of Educ. of City of N. Y.*, 258 N. Y. 117, 123; 22 Carmody-Wait, New York Practice, p. 187. *Matter of Donegan* v. *Patterson*, 4 Misc. 2d 81, cited by the board, appears distinguishable since no statutory or other duty was referred to.

permission both to reply and to amend their petition and have filed a reply containing the allegation said to be missing. Since the petition does not *in haec verba* make the allegation, the court in the exercise of the discretion with which it is clothed by section 1294 of the Civil Practice Act, grants the request to amend in order to obviate any question on the point,[13] although the fact is one that will be judicially noticed [14] and, therefore, need not be pleaded or proved.[15] Paragraph 4 of the petition is deemed amended by inserting at the end thereof the words: "All of the schools referred to in paragraph '2' of this petition are within Union Free School District Number Nine and under the jurisdiction and control of Respondents", and the answers of respondents and intervenors are deemed answers to the petition as thus amended.

Whether the petition alleges facts sufficient to establish that the board failed to perform a duty enjoined by law is largely dependent upon a determination of the constitutional duty imposed. For reasons hereafter set forth at length, it is held that while the board may authorize, it may not require, the saying of the prayer in question, but that if it does so, it must bring the authorization to the attention of parents of children in the schools, establish a procedure for excusing nonparticipants not only from saying the prayer but from the room, if they so elect, and take affirmative steps to protect the religious freedom of both nonparticipants and participants.

The petition alleges that the board by resolution directed that the prayer be said as a daily procedure and that it is being said aloud each day in the schools of the district, that the saying of the prayer and the manner and setting

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13. *Lake Mahopac Heights* v. *Zoning Board of Appeals*, 119 N. Y. S. 2d 809.

14. *People* v. *Wood*, 131 N. Y. 617; *Armstrong* v. *Cummings*, 20 Hun 313.

15. *Shaw* v. *Tobias*, 3 N. Y. 188; 3 Carmody-Wait, New York Practice, p. 472.

in which it is said are contrary to the religious practices of those petitioners and their children who are believers and contrary to the beliefs concerning religion of those petitioners and their children who are nonbelievers, and that demand has been made for discontinuance of the prayer and refused by respondent board. What is alleged thus shows violations of constitutional duty in that (1) the board has required rather than authorized the daily use of the prayer, and (2) the manner of its being said does not protect the rights of nonbelievers or the religious scruples of all of the believers. What is alleged is a "due process" rather than an "equal protection" question and it, therefore is not necessary to allege or prove purposeful discrimination in administration of the resolution.[16] While a presumption of constitutionality might, in view of the absence of allegations of fact showing compulsion,[17] warrant the court in construing the board's direction as being in fact only an authorization, such a presumption, if one exists in religion cases,[18] cannot supply the missing safeguards which the constitutional privilege of free exercise mandates. The petition states a cause of action, therefore.

The foregoing disposes of all of the board's defenses except the sixth, which sets up the constitutional right of children other than petitioners' to say the prayer free from interference, and of all procedural questions except petitioners' motion for a jury trial and the determination of petitioners' standing to sue. For reasons hereafter set

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16. *Matter of Diocese of Rochester* v. *Planning Bd. of Town of Brighton*, *supra*, n. 10, p. 521.

17. The petition alleges in language substantially the same as that used in the petition in *Zorach* v. *Clauson*, 343 U. S. 306, that the saying of the "prayer and the manner and setting in which it is said have necessarily resulted in the exercise of coercion upon the children", but this is a conclusory allegation and does not implicate the board. See 343 U. S. 306, 311, n. 7, cf. *ibid.*, p. 321.

18. See, e.g., *Prince* v. *Massachusetts*, 321 U. S. 158, 167, "It cannot be sustained by any presumption of validity."

forth the defense is held to be without merit and the motion for jury trial is denied.

Petitioners' standing to sue is established by the *Zorach* case as a matter of both New York [19] and Federal [20] law. This results not only from the fact that petitioners are parents of children who are currently attending the schools subject to the program but also from the fact that the prayer and the manner and setting in which it is said are contrary to the beliefs of petitioners and their children.[21] There will have been "actual interference" [22] with the religious freedom of petitioners and of their children unless they are given notice of and an opportunity to make a conscious choice concerning participation in the prayer, and unless steps are taken to see that their freedom not to participate is respected.

Since it has been suggested that section 801 and section 3204 of the Education Law impose a duty on the Board of Regents, and that respondent board in requiring the prayer was only carrying out a duty imposed on it by the Regents, the legal status of respondent board should also be ascertained. The Board of Education of a union free school district exists as a separate body corporate.[23] As such it is distinct from the Board of Regents, which heads the Department of Education and which appoints, and at pleasure may remove, the Commissioner of Education.[24] The Commis-

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19. *Matter of Zorach* v. *Clauson*, 303 N. Y. 161. The concurring opinion of Judge DESMOND raises objections on the point which clearly do not apply to the instant case. See, also, *Baer* v. *Kolmorgen*, 14 Misc. 2d 1015.

20. *Zorach* v. *Clauson*, *supra*, n. 17, p. 309, n. 4, which distinguished *Doremus* v. *Board of Educ.*, 342 U. S. 429. Accord: *McCollum* v. *Board of Educ.*, 333 U. S. 203, 206.

21. Note 66 Harv. L. Rev. 89, 120.

22. *United Public Workers* v. *Mitchell*, 330 U. S. 75, 89.

23. Education Law, § 1701; *Judd* v. *Board of Educ.*, 278 N. Y. 200.

24. N. Y. Const., art. V, § 4 and art. XI, § 2; Education Law, §§ 101, 201.

sioner of Education is the chief executive officer of the Board of Regents, enforces the laws relating to education, and carries out the policies of the Board of Regents.[25] Attendance of minors from 7 to 16 years of age upon full-time day instruction is compulsory[26] and instruction is required by statute in particular subjects.[27] Neither prayer nor religion is mentioned in the law, except that because of their religious beliefs, children may be excused, under regulations of the Regents, from attendance at health or hygiene education[28] and absence for religious observance and education must be permitted under rules established by the Commissioner.[29] The Regents must prescribe courses in patriotism and citizenship which must be attended by all pupils over eight years of age, and in the history and meaning of the Declaration of Independence and the United States and New York Constitutions which must be attended by all pupils in the eighth and higher grades.[30] The contention that respondent board acted in furtherance of the Regents' directions issued under the foregoing provision cannot be sustained, however, for the provision speaks of "patriotic and civic service" and the fostering of "moral and intellectual qualities" whereas the documents issued by the Regents[31] concern themselves with not only those problems but also "spiritual training". Further, those documents make no reference to the provision and are entitled "Regents Statement" and "Regents' Recommendations", obviously not mandatory prescriptions. Further,

25. Education Law, § 305, subd. 1.

26. *Ibid.*, § 3205. Such attendance may be at a public school or at a private or parochial school which meets the curriculum requirements established by the law. § 3204 (subd. 1).

27. *Ibid.*, §§ 3204, 801-810.

28. *Ibid.*, § 3204 (subd. 5).

29. *Ibid.*, § 3210 (subd. 1 [par. b], subd. 2 [par. b]).

30. *Ibid.*, § 801. Respondent relies also on section 1709 (subd. 5) read together with section 801. Since for the reasons given in the text, section 801 does not impose a duty, section 1709 (subd. 5) does not either.

31. *Supra*, n. 5.

the board's answer, insofar as it relies on a direction that no child is to be required to join in the prayer, is inconsistent with such a contention, since the statute is compulsory and the Legislature made no provision for exception. Finally, neither the Regents' Statement nor the board's resolution makes the distinction that the statute does between children over and under the age of eight years. It follows, therefore, that the board's resolution, though referring to and inspired by the Regents' Statements, must be considered voluntary and that the Regents' policy and program set forth in those statements are involved in this decision only insofar as they form the background for and are referred to in the action of the board. In short, what is to be considered is the power of the board, unsupported by any administrative, legislative or constitutional requirement that it provide spiritual training or adopt the resoluton of July 8, 1958.

The Constitutional Questions

We are brought then to a determination of the constitutional issues. The question is a close one, and since, as Mr. Justice Holmes observed the "controversies are apt to be fierce in proportion to the nicety of the question",[32] a few general observations are, perhaps, in order. In the first place, a judge's task in such a determination is "never [to] substitute his personal appraisal of the interests at stake, or his personal preference between them * * * [but rather] * * * to decide how those who have passed the 'enactment' would have dealt with the 'particulars' before him, about which they have said nothing whatever."[33] Second, the emotionalism generated by such controversies necessitates careful analysis of the arguments made in order to place them in proper perspective, to exclude purely policy matters and to reject *in terrorem* contentions made without substantial basis. Thus, the thesis that the present

32. Holmes-Pollock Letters (1941) Vol. I, p. 216.
33. Hand, The Spirit Of Liberty (1952), 216.

rate of juvenile delinquency evidences the need for prayer in the schools is a matter of policy and of no weight in determining what constitutional provisions framed in 1789 and 1865 mean.[34] So also while it may validly be argued that the appointment of chaplains by the Congress in 1791 represents a practical construction by the Congress responsible for the First Amendment of its meaning, the fact that the appropriation acts covering the pay of Congressional chaplains has never been held invalid is of no weight, since no citizen has standing to bring an action to prevent such a payment.[35] Again, Franklin's suggestion to the Constitutional Convention of daily prayer as a means of breaking its deadlock assumes lesser proportion when it is realized that the suggestion, though seconded, was not adopted by the convention.[36] Similarly, to be rejected, in view of the essentially different nature of prayer on the one hand from the study of historical fact on the other, is the specter of "Godless" schools in which, if the prayer here involved is not sanctioned, references to God in the Constitution and the Declaration of Independence will not

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34. More in point would be the fact that Patrick Henry made the same argument in 1784 in support of the Bill Establishing a Provision for Teachers of the Christian Religion (Brant, James Madison, The Nationalist [1948] 344) that the initial passage of the bill by the Virginia Legislature provoked Madison's famous Memorial and Remonstrance, and that, as a result, the assessment plan which the bill would have imposed was killed by the next session of the Legislature.

35. *Elliott v. White*, 23 F. 2d 997. Likewise persons with standing may choose not to act for personal reasons, e.g.—Madison though he thought thanksgiving proclamations a "deviation from the strict principle" nonetheless "found it necessary to follow the example of his predecessors", Letter to Edward Livingston, quoted in Stokes, Church And State In The United States (1950), Vol. I, p. 491, and it is hardly to be expected that the winner of a coveted appointment to one of the armed forces academies, or his parents, will institute action to declare unconstitutional the academy's regulation covering compulsory chapel.

36. Stokes, *supra*, n. 35, Vol. I, pp. 454-455.

be permitted. In sum, the constitutional line to be drawn can only be determined by an analysis of the fact situation involved, the history of the constitutional provisions, and the holdings (together with but distinct from the language used in stating those holdings) of judicial decisions construing the constitutional provisions (or provisions essentially similar).

The Fact Situation

The facts on which the constitutional determination is to be made encompass those drawn from the answer and answering affidavit as well as from the petition and reply.[37] For purposes of clarification, they are restated as follows: Petitioners are citizens, resident in Union Free School District Number Nine, whose children, pursuant to the Education Law, attend schools run by the district. Petitioners include members of the Jewish faith, of the Society for Ethical Culture, of the Unitarian Church, and one nonbeliever. The respondent board on July 8, 1958, by majority vote resolved "that the regents prayer be said daily in our schools" and "gave direction to the District Principal that this be instituted as a daily procedure to follow the Salute to the flag." The prayer referred to, the words of which are set forth at the beginning of this opinion, originated in the Regents' Statement on Moral and Spiritual Training in the Schools adopted November 30, 1951, which statement was supplemented by the Regents' Recommendations for School Programs on America's Moral and Spiritual Heritage adopted March 25, 1955.[38] It is said aloud at the commencement of the school day, by each class, in the classroom in the presence of a teacher. Though not specifically incorporated in the board's resolution, or

37. Civ. Prac. Act, §§ 1291, 1292, 1295, 1296.

38. Too long to set forth herein at length, but such language therefrom as is directly pertinent will be referred to in later portions of this opinion.

otherwise publicized, the board directed that no child was to be required or encouraged to join in the prayer against his or her wishes; only one request that a child be excused from saying the prayer was received in the schools of the district, which request was respected; and no child has directly asked to be excused from joining in the prayer nor has either a parent or a child sought permission for a child to leave the classroom during the saying of the prayer.[39] The saying of the prayer and the manner and setting in which it is said are contrary to the religion and religious practices of those petitioners, and their children, who are believers, and to the beliefs concerning such matters held by the petitioner, and his children, who are nonbelievers.[40] Petitioners have demanded that the saying of the prayer in the schools of the district be discontinued, which respondents have refused to do.

The Nature of Prayer and of the Instant Prayer

The first inquiry to which we are brought by the facts above found is the nature of prayer. The dictionary definitions include: "Act of addressing supplication to a divinity or object of worship; the offering of adoration, confession, supplication, thanksgiving, etc., to a God", "[t]he form of

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39. The facts in the noted sentence are drawn from the affidavit of William J. Vitale, Jr., president of the board. The allegation of paragraph 10 of the petition that "During the saying of the prayer, no student is permitted to leave the classroom", is not inconsistent with the facts thus found, and petitioners have not availed themselves of the opportunity to controvert those facts in a reply affidavit. They are, therefore, taken as true.

40. The facts found in the noted sentence are drawn from paragraphs 12 and 13 of the petition. While denied by both the board and the intervenors, religion and beliefs concerning religion are subjective matters into which the court cannot inquire, *United States* v. *Ballard*, 322 U. S. 78, revd. on other grounds after remand 329 U. S. 187; *Fowler* v. *Rhode Island*, 345 U. S. 67, 70, except, perhaps, to determine whether the beliefs are held in good faith. Neither the board nor intervenors have denied petitioners' good faith or ask for a trial of the question.

words used in praying", "[a] form of religious service or worship for public or common use, consisting largely of prayers; as, Morning or Evening *Prayer*." [41] The religious nature of prayer was recognized by Jefferson [42] and has been concurred in by theological writers,[43] the United States Supreme Court [44] and State courts [45] and administrative officials,[46] including New York's Commisisoner of Educa-

41. Webster's New International Dictionary (2d ed.).

42. He refused to proclaim a day of thanksgiving on the ground that the First Amendment would be violated by his so doing. In his letter of January 23, 1808 to Rev. Samuel Miller explaining his position Jefferson stated: "Fasting & prayer are religious exercises. The enjoining them an act of discipline. Every religious society has a right to determine for itself the times for these exercises, & the objects proper for them, according to their own particular tenets". Writings Of Thomas Jefferson (Ford ed.) Vol. IX, p. 175.

43. Fosdick, Meaning Of Prayer (1916), 32, describes prayer as "communion with God"; Heiler, Prayer (1932), 362, concurs in this definition and concludes that "prayer is the centre of religion." A medieval proverb tells us that "Prayer without devotion is like a body without a soul". Union Prayer Book (1940), Vol. I, p. 4.

44. *Fowler* v. *Rhode Island*, *supra*, n. 40, p. 70: "Sermons are as much a part of a religious service as prayers"; *United States* v. *Ballard*, *supra*, n. 40, p. 87: "the power of prayer * * * deep in the religious convictions of many"; *Holy Trinity Church* v. *United States*, 143 U. S. 457, in which in expounding the thesis that this is a religious nation the court referred (p. 471) to "the custom of opening sessions of all deliberative bodies and most conventions with prayer".

45. Agreeing that prayer is a religious exercise, religious worship, part of religion: *Spiller* v. *Inhabitants of Woburn*, 94 Mass. 127; *Moore* v. *Monroe*, 64 Iowa 367; *State ex rel. Weiss* v. *District Bd. of School Dist. No. 8 of Edgerton*, 76 Wis. 177; *State ex rel. Freeman* v. *Scheve*, 65 Neb. 853; *State ex rel. Freeman* v. *Scheve*, 65 Neb. 876; *Hackett* v. *Brooksville Graded School Dist.* 120 Ky. 608; *People ex rel. Ring* v. *Board of Educ.*, 245 Ill. 334; *Herold* v. *Parish Bd. of School Directors*, 136 La. 1034; *State ex rel. Finger* v. *Weedman*, 55 S. D. 343.

46. 1909-1910 Atty. Gen. (Wash.) 135; 25 Cal. Ops. Atty. Gen. 316 (1955).

tion.[47] A committee of the New York Legislature has agreed.[48]

The Board of Regents as *amicus curiae*, the respondents and the intervenors all concede the religious nature of prayer, but seek to distinguish this prayer because it is based on our spiritual heritage. On this score, they argue that it is established that this is a religious nation, that many examples exist of the religious belief of the Founding Fathers, that the wording of the prayer in invoking "Almighty God", in acknowledging "our dependence upon Thee" and in asking "Thy blessings" is derived from national organic documents, that the prayer is to be said in conjunction with the Pledge of Allegiance and "as an incident to the Pledge of Allegiance ceremony", that it was recommended with the understanding that no child would be forced to say it, and that the recommendation was silent as to requirements respecting attire, posture, gestures and the like.[49] The argument proves too much, both as to "establishment" and "free exercise". If it be assumed for the moment that the Constitution prohibits prescription of mode of worship and that, therefore, prayer may not be prescribed, the State's interest in familiarizing students with the religious nature of our heritage would not justify the use of prayer as a vehicle for imparting that knowledge since there are other equally effective and constitutionally

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47. *Matter of Dargin*, 72 N. Y. St. Dept. Rep. 27 (1951), which held that a baccalaureate service could not be held in the schools because "a religious service". The decision noted, however, that this was not intended to prohibit the opening and closing of school functions with customary invocation and benediction. The decisions of the Commissioner's predecessor referred to in note 3 (*supra*) are based on recognition of the religious nature of prayer.

48. Blau, Cornerstones Of Religious Freedom In America (1949), 136ff. recounts a controversy over payment of a legislative chaplain ending in a report in 1832 stating (p. 146) "Prayer is not a civic, but *religious* duty." The provision for payment was repealed the next year.

49. The burden of the argument is set forth in the Statement and Recommendation referred to in note 5 (*supra*), and those documents contain many historical examples.

uninhibited means of achieving that end. If, on the other hand, the purpose is to inculcate in pupils a love of God,[50] then as we shall hereafter see, as an exercise required of all pupils, it would constitute religious instruction in violation of the "establishment" clause and as a permissive exercise it would, unless it gives positive recognition to the right of any participating child to adopt any posture, use any gesture, wear any attire, use any language, or follow any other practice which his or her own religious beliefs may dictate, violate the "free exercise" clause of the Federal and State Constitutions, as well as the parent's rights, hereafter discussed, under the due process clause to control the education of his child.

It is, however, also contended that the recognition of prayer is an integral part of our national heritage, and that, therefore, the "establishment" clause cannot have been intended to outlaw the practice in schools any more than from the rest of public life; that is, that prayer in the schools is permissible not as a means of teaching "spiritual values" but because traditionally, and particularly at the time of the adoption of the First and Fourteenth Amendments, this was the accepted practice. With this argument the court agrees. To spell out the reasons for this conclusion, however, requires reference to history.

The History of the Constitutional Provisions and of Public Education

Although the writings of Jefferson and Madison are often referred to on matters of constitutional interpretation, it was Jefferson's view that in such matters one should "recollect the spirit manifested in the debates, and * * * conform to the probable [meaning] in which it was

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50. The Statement speaks of the prayer as "this act of reverence to God" and of the school's function of "ever intensifying in the child that love for God, for parents and for home which is the mark of true character training." Of course, respondent board is not bound by the Statement.

passed"[51] and Madison argued that "It is the sense of the nation, therefore, not the sense of the General Convention, that is to be consulted; and that sense, if not taken from the act itself, is to be taken from the proceedings of the State Convention & other public indications as the true keys to the sense of the Nation."[52] Unfortunately, as Story pointed out,[53] the varying interpretations presented in such State conventions makes them at best uncertain and inconclusive criteria. Generally, then, in construing the Constitution, one must look to the history of the times and examine the state of things when the provision in question was adopted.[54]

The history of the adoption of the Fourteenth Amendment has been examined in three exhaustive studies.[55] While they show that Congressman Bingham and Senator Howard in debate indicated the purpose of the amendment to be to guarantee the personal rights protected by the first eight amendments against State action,[56] the Supreme Court has within the last few months once again refused to adopt this

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51. Letter of June 12, 1823 to William Johnson, The Writings Of Thomas Jefferson (Ford ed.), Vol. X, p. 231.

52. Fleet, Madison's "Detached Memoranda", 3 Wm. & Mary Quarterly Hist. Mag. (3rd Ser.) 534-544. On this ground *Maxwell* v. *Dow*, 176 U. S. 581, 601, rejected statements in Senate speeches on the passage of the Fourteenth Amendment offered to prove that the first eight amendments of the Bill of Rights had been incorporated in that amendment.

53. Commentaries On The Constitution (1833), 406.

54. *Rhode Island* v. *Massachusetts*, 12 Pet. (37 U. S.) 657, 723. So in *Reynolds* v. *United States*, 98 U. S. 145, the Supreme Court turned to the history of the times to ascertain the meaning of "religion" as used in the First Amendment.

55. Flack, Adoption Of The Fourteenth Amendment (1908); Fairman, Does The Fourteenth Amendment Incorporate The Bill Of Rights?, 2 Stan. L. Rev. 5; James, The Framing Of The Fourteenth Amendment, Illinois Studies in Social Sciences, Vol. 37 (1956).

56. Flack, *supra*, n. 55, pp. 80, 84, 86.

thesis,[57] and in any event these are general references, making no specific allusion to the guarantees concerning religion. The closest such was Bingham's reference, in a speech accepting his renomination to Congress, to his part in framing the first section of the Fourteenth Amendment, which "he said, placed the golden rule in the Constitution."[58]

If we turn then from constitutional history to the history of the times, we find that by 1868, when the Fourteenth Amendment was ratified, "the separation of public education from Church entanglements, of the State from the teaching of religion, was firmly established in the consciousness of the nation",[59] but that such separation did not extend to the exclusion of prayer or the reading of the Bible from public school routines. While some of the State Constitutions then in force contained provisions forbidding sectarian instruction or the use of public funds for denomi-

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57. *Bartkus* v. *Illinois*, 359 U. S. 121, decided March 30, 1959, in which the court stated (p. 124): "The relevant historical materials * * * demonstrate conclusively that Congress and the members of the legislatures of the ratifying States did not contemplate that the Fourteenth Amendment was a short-hand incorporation of the first eight amendments making them applicable as explicit restrictions upon the States."

58. James, *supra*, n. 55, p. 160. The speech was made August 10, 1866. In it Bingham gave as an example that men in Georgia would not be imprisoned, as they had been in the past, for teaching the Bible. In debate on the bill to implement the Fourteenth Amendment, Bingham was somewhat more specific as to his intentions (Cong. Globe, 42nd Cong., 1st Sess., App. pp. 83-85), but this was on March 31, 1871, long after the amendment had been ratified. *Brown* v. *Board of Educ.*, 347 U. S. 483, 490 notes also that there is "little in the history of the Fourteenth Amendment relating to its intended effect on public education."

59. Mr. Justice FRANKFURTER, concurring in the *McCollum* case, *supra*, n. 20, p. 217. He referred to 1875, when President Grant's speech brought the matter to a head nationally, but it was equally true in 1868. The status of public education at the time the amendment was adopted is also footnoted in *Brown* v. *Board of Educ.*, *supra*, n. 58, p. 489, n. 4.

national schools, or both,[60] the schools were generally opened with prayer.[61] Massachusetts had a law requiring the reading of the Bible in the schools,[62] and New York's Superintendent of Common Schools had ruled no less than five times that prayer and Bible exercises could be conducted in the schools before school hours, but could not be made compulsory.[63] Only two cases dealing with the Bible in the schools had reached the appellate courts; in both use of the Bible was allowed to continue, in one on the basis of its literary value, in the other, in part, because the regulation included provision for excuse.[64] The controversy which began in the late 1830's over religion in the schools and public support of parochial schools included as one of its facets mandatory Bible reading and prayers in the

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60. The State constitutional provisions and their adoption dates are tabled in O'Neill, Religion And Education Under The Constitution (1949), 140ff. and Cubberley, Public Education In The United States (1919), 180. The latter lists 14 States with such provision by 1868. Bible reading and prayer may, of course, infringe such a State provision, see cases cited, *infra* notes 154-158, and if compulsory will also, as is hereafter demonstrated, violate the First and Fourteenth Amendments.

61. Beale, A History Of Freedom Of Teaching In American Schools (1941), 95.

62. Johnson & Yost, Separation Of Church And State (1948), 33. It should be noted that almost the entire Legislature and administration elected in 1854 were Know-Nothings, Billington, The Protestant Crusade (1938), 412.

63. *Op. cit., supra*, n. 3.

64. *Donahoe* v. *Richards*, 38 Me. 379 (1854); *Spiller* v. *Inhabitants of Woburn*, *supra*, n. 45 (1866). A Boston Police Court case which attracted wide enough attention to cause its reprinting in separate pamphlet form and in a Pennsylvania legal publication, *Commonwealth on Complaint of Wall* v. *Cooke*, 7 Am. L. Reg. 417 (1859), exonerated from liability for criminal assault a teacher who beat with a rattan stick a Catholic child who refused, on instruction of his father and his priest, to say the Lord's Prayer or repeat the Ten Commandments.

schools,[65] the Catholic minority seeking to exclude the Bible and prayer, the Protestant majority strenuously opposing such exclusion. The battle that followed saw the formation in 1864 of the National Association to Secure the Religious Amendment to the Constitution, an organization dedicated to having God and the Bible recognized in the Constitution,[66] and the counter organization of the Liberal League whose demands included the discontinuance of all religious instruction, and particularly use of the Bible in the schools.[67] The climax of the controversy came with President Grant's 1875 address to the Army of the Tennessee inveighing against public support of sectarian schools[68] and his annual message of that year calling for an amendment requiring the States to maintain public schools and forbidding the teaching in them of religious, atheistic or pagan tenets.[69] This was followed in 1876 by the introduction of the Blaine Amendment, which would have incorporated that principle in the Federal Constitution, and the inclusion in the Republican party platforms of 1876 and 1880 of planks supporting Grant's position.[70] Although the amendment was defeated in the Senate, its defeat was apparently not due

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65. Connors, Church State Relationships In Education In The State Of New York (1951), 56. Connors records (p. 76), that the Catholic Second Plenary Council of Baltimore in 1866 enjoined pastors to keep watch "lest their Catholic children use Protestant versions of the Bible, sing sectarian hymns, or recite prayers in the schools."

66. Lardner, How Far Does The Constitution Separate Church And State, 45 Am. Pol. Sci. Rev. 110-120; Blau, *op. cit., supra*, n. 48, at 203.

67. Blau, *supra*, n. 48, at 208.

68. Stokes, *supra*, n. 35, sets forth the address (Vol. II, p. 722) and notes the editorial comment of the *Catholic World*, which reported the address, that this meant no support to the then system of common schools, "because they are sectarian."

69. 4 Cong. Rec. 175.

70. Lardner, *op. cit., supra*, n. 66, p. 121, where it is also noted that the Democrats affirmed adherence to the principle of separation but opposed the Republican proposal as invading States' rights.

to opposition to its principle,[71] and was followed by adoption of similar provisions in the Constitutions of most, it not all, of the States which did not have such provisions, and in a Congressional requirement that newly admitted States include in their Constitutions a provision for maintenance of a school system free from sectarian control.[72]

Notwithstanding the strong current of opinion thus demonstrated, the history of the times shows that it did not extend to the exclusion of the Bible and prayer from the schools. Thus out of the New York phase of the battle came an 1844 Act of the Legislature prohibiting New York City's Board of Education from excluding Bible reading, without note or comment, but prohibiting it from directing which version should be read;[73] its Massachusetts phase required Horace Mann, often referred to as the father of the American public school system, to defend himself against a charge that as Secretary of the State Board of Education, he sought to drive religion from the schools, with the denial "that I have ever attempted to exclude religious instruction from school, or to exclude the Bible from school";[74] its national phases saw the rise of the Know-Nothings and the American Protestant Association, both bitterly anti-Catholic organizations,[75] the ensuing formation of the American Party and the adoption in 1855 by that party of a platform which favored maintenance of

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71. Pfeffer, Church, State And Freedom (1953), 131, explains the defeat as partly partisan and partly resulting from the belief that State constitutions adequately dealt with the question. See also Justice FRANKFURTER concurring in *McCollum* v. *Board of Educ.*, *supra*, n. 20, 219, n. 6.

72. *Ibid.*, and see O'Neill and Cubberley, *loc. cit.*, *supra*, n. 60.

73. Chapter 320 (§ 12) of the Laws of 1844, which became section 1151 of the Greater New York City Charter and was the subject of *Lewis* v. *Board of Education*, *infra*, n. 148.

74. Culver, Horace Mann And Religion In The Massachusetts Public Schools (1929), 204; compare Pfeffer, *supra*, n. 71, at 285.

75. Stokes, *supra*, n. 35, Vol. I, p. 829ff., 833ff.; Pfeffer, *supra*, n. 71, 374ff.; Sweet, The Story Of Religion In America (1930), 394.

undenominational schools but declared that the Bible "should not be excluded from the public schools",[76] and the inclusion in the Senate version of the Blaine Amendment of a specific provision that "This article shall not be construed to prohibit the reading of the Bible in any school or institution."[77] And during all this period, McGuffey's Third Reader, first published in 1837, revised in 1843, 1853, 1878, 1896 and 1901, and widely used in schools throughout the United States over a period of 70 years,[78] included the Lord's Prayer (though in slightly revised form, as a poem), an Evening Prayer and a Child's Hymn. The conclusion is inevitable that in 1868, the "sense of the nation", to revert to Madison's phrase, could not be read as indicating, by ratification of the Fourteenth Amendment, the exclusion of the Bible or of prayer from the public schools.[79]

Is there anything in the history of the First Amendment that might lead to a contrary conclusion? If we look at the history of the period in which Madison introduced his proposed amendments, we find that church establishments were still maintained in Massachusetts, Connecticut, New Hamp-

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76. Greene, Religion And The State (1941), 110.

77. 4 Cong. Rec. 5453, see also Meyer, The Blaine Amendment and the Bill of Rights, 64 Harv. L. Rev. 939.

78. Vail, History Of The McGuffey Readers (1911).

79. Butts, American Tradition In Religion And Education (1950), 137, Bates, Religious Liberty (1945), 92, and Stokes, *supra*, n. 35, Vol. II, p. 493, record the variations in legal requirements and consequent doubt concerning Bible reading and prayer in the schools. The situation in 1870 is graphically illustrated by the delivery in New York City, and publication in pamphlet form, in that year of sermons for (Boole, Our Bible, Our Schools And Our Flag, One And Inseparable) and against (Spear, The Bible In The Public Schools) the Bible in the schools, and the publication in that year by a former New York Supreme Court Justice of a book proposing an amendment to the Federal Constitution (Hurlbut, Secular View Of Religion In The State), one of his aims being the exclusion of the Bible and prayer from the schools (*ibid.*, p. 46).

shire, South Carolina and Maryland,[80] that education was largely a matter of church schools [81] and that, as would be expected under church aegis, prayer, and indeed religious instruction, were a regular part of school routine.[82] The fact that Madison's fifth proposal, that "No State shall violate the equal rights of conscience" failed of adoption;[83] the various versions through which his fourth proposal, which became the First Amendment, passed;[84] and the language of the final provision that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof;" made it clear, and it was early so held,[85] that the First Amendment had no application to the States. The only phase of the history of the amendment related to prayer was the proposal, made in the Senate, that "Congress shall make no law establishing articles

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80. Zollman, American Church Law (1933) 4, and Stokes, *supra*, n. 35, Vol. I, p. 433 both include South Carolina; Pfeffer, *supra*, n. 71, p. 126, does not. All were multiple establishments. It was not until 1833 that the last establishment, in Massachusetts, was terminated. Greene, *supra*, n. 76, p. 94.

81. The history of colonial education was developed by Mr. Justice FRANKFURTER in his *McCollum* concurring opinion, *supra*, n. 20, pp. 213-215, and is also recorded in Cubberley, *supra*, n. 60, pp. 44, 53; Pfeffer, *supra*, n. 71, at 274; Keller, All God's Children (1953), 277ff.; Bates, *supra*, n. 79, 210ff.; Stokes, *supra*, n. 35, Vol. II, p. 45ff.

82. Stokes, *supra*, n. 35, Vol. II, p. 53;; Lardner, *supra*, n. 66, p. 122; Cubberley, *supra*, n. 60, p. 28; Connors, *supra*, n. 65, pp. 2-4, 14; Pfeffer, *supra*, n. 71, p. 278.

83. Dumbauld, The Bill Of Rights And What It Means Today (1957), 46, 207.

84. Dumbauld, *ibid.*, 39, 45, sets forth the history with appropriate references to the Annals of Congress and the Journal of the Senate, and in separate Appendices reprints the amendments as offered by Madison, as reported by the Select Committee, as passed by the House, as passed by the Senate and as agreed to after conference and finally proposed to the States.' See, also, Perry, Sources Of Our Liberties (1959), 422-425; Stokes, *supra*, n. 35, Vol. I, 538-548; Sullivan, Religious Education in the Schools, 14 Law and Cont. Pro. 92, 106ff.

85. *Permoli* v. *Municipality No. 1 of City of New Orleans*, 3 How. (44 U. S.) 589, 609, decided in 1845 first applied the principle to the religion provisions. *Barron* v. *Mayor & City Council of Baltimore*, 7 Pet. (32 U. S.) 243, decided in 1833, had held that the Bill of Rights was not intended to restrain the States.

of faith or a mode of worship". The attempt to thus limit the amendment was rejected, but indicates that even those who sought a limited form of restriction agreed that the prohibition against establishment extended to "mode of worship," which would include prayer. One must conclude from the debates and the history, therefore, that the First Amendment's relationship to prayer was general, in the sense that there should be no compulsion to recite a prescribed form of prayer, rather than specific, in the sense that the then existing routine of prayer should be excluded from the schools.

If we ignore the limits of constitutional history above set forth, and examine into the individual views of the Founding Fathers,[86] we are brought to no different conclusion. Thus, as we have noted above, Franklin both wrote his own version of the Lord's Prayer and suggested the efficacy of daily public prayer[1] to the Constitutional Convention. As concerns Madison, though in later life he changed his views,[87] he was a member of the committee of Congress which arranged for a Congressional Chaplain,[88] and served with Jefferson on the Board of Visitors of the University of Virginia which in its 1822 report and 1824 regulations permitted use of rooms in the main building for religious worship.[89] Jefferson, who thought the prescrip-

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86. Mr. Justice JACKSON called such materials "as enigmatic as the dreams Joseph was called upon to interpret for Pharaoh". *Youngstown Co. v. Sawyer*, 343 U. S. 579, 634.

87. In the "Detached Memoranda", he took the position that both legislative and service chaplains were violations of the Constitution, but could be considered *de minimus*, Fleet, *op. cit., supra*, n. 52, at 558-560.

88. Brant, James Madison, Father Of The Constitution (1950), 272, which however is careful to note that this was in 1789, before there was a constitutional provision.

89. Butts, *supra*, n. 79, p. 119, which, however, notes that on April 21, 1825, Jefferson wrote a letter refusing permission to hold religious services in a University building which apparently overlooked the 1824 regulations. Madison in an 1824 letter spoke of the use of a public hall for religious exercises which students were free to attend or not as they chose, and said that it presented some difficulties but seemed the best plan of escaping the problem of theological professorships. Brant, Madison: On Separation of Church and State, 8 Wm. & Mary Quarterly Hist. Mag. (3rd Ser.) 3, 20.

tion of a day of prayer so far a violation of the First Amendment and the reserved powers of the States as to prohibit him from proclaiming a Thanksgiving Day, nonetheless provided in his 1817 draft of a bill to establish a public school system in Virginia only that "no religious reading, instruction or exercise shall be prescribed or practiced, *inconsistent with the tenets of any religious sect or denomination*",[90] and also participated in the adoption (as did Madison) of the 1824 regulations for the University of Virginia providing that "students of the University will be free, and expected to attend religious worship at the establishment of their respective sects, in the morning, and in time to meet their school in the University at its stated hour".[91] While the strength of view and breadth of vision of Madison's famous Memorial and Remonstrance[92] and Jefferson's Republican Notes on Religion[93] may be considered the core of thought embodied in the First Amendment,[94] there is nothing in any of those documents that indicates an intention on the part of either author to exclude the routine of prayer from the schools, provided only that that routine be not compulsory.

The Decisional Law

Since our conclusion must, then, be that neither the sense of the nation, the debates, nor the individual views of the framers proscribe prayer as the ceremonial opening of a

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90. Italics supplied. The language is from section 11 of Jefferson's 1817 "Bill for Establishing a System of Public Education", which is reprinted in Honeywell, Educational Works Of Thomas Jefferson (1931), 235. The bill was not enacted (*ibid.*, 65).

91. *Ibid.*, 274.

92. Which is reprinted in Blakely, *supra*, n. 1, p. 83, and as an appendix to Mr. Justice RUTLEDGE's dissent in *Everson* v. *Board of Education*, 330 U. S. 1, 66.

93. Which reprinted, in 1803, that portion of Notes On The State Of Virginia (1784) relating to religion (Query XVII) together with the Act for Establishing Religious Freedom. Both are also set forth in Padover, The Complete Jefferson (1943), 673 and 946, and Blau, *supra*, n. 48, pp. 74, 76.

94. See Levitan, Mr. Justice RUTLEDGE, 34 Va. L. Rev. 526, 533-535; *Reynolds* v. *United States*, *supra*, n. 54, p. 164.

school day, we turn to the decisional law. As above noted, the Supreme Court early adopted the position that the First Amendment did not apply to the States; until 1922, it continued to assert this view despite the passage of the Fourteenth Amendment.[95] It also, within four years after the ratification of the Fourteenth Amendment, decided in the *Slaughter-House Cases*[96] that the privileges and immunities clause of that amendment did not include the rights set forth in the first eight amendments. Despite repeated assaults on that position, the court continues to adhere to it.[97]

Nonetheless, both the "free exercise"[98] and "establishment"[99] provisions of the First Amendment are now clearly applicable to the States. Though the early decisions so indicating relied on "free speech" cases and referred to infringement of the "liberty" protected by the due process clause, most of the later cases speak of the

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95. *Prudential Ins. Co.* v. *Cheek*, 259 U. S. 530, decided in that year, held that (p. 543) "neither the Fourteenth Amendment nor any other provision of the Constitution of the United States imposes upon the States any restrictions about 'freedom of speech'".

96. 16 Wall. (83 U. S.) 36.

97. Mr. Justice STONE, in *Hague* v. *C. I. O.*, 307 U. S. 496, 521, n. 1, refers to over 50 attempts, up to 1935, to upset the rule of the *Slaughter-House Cases*. Mr. Justice FRANKFURTER concurring in *Adamson* v. *California*, 332 U. S. 46, 61, referred to "the mischievous uses to which that clause would lend itself if its scope were not confined".

98. *Meyer* v. *Nebraska*, 262 U. S. 390 (dicta); *Hamilton* v. *Regents*, 293 U. S. 245, 261; *Cantwell* v. *Connecticut*, 310 U. S. 296, 303; *Minersville Dist.* v. *Gobitis*, 310 U. S. 586, 593; *Chaplinsky* v. *New Hampshire*, 315 U. S. 568, 571 (dicta); *Jones* v. *Opelika*, 316 U. S. 584, revd. on rehearing 319 U. S. 103; *Murdock* v. *Pennsylvania*, 319 U. S. 105, 108; *Board of Educ.* v. *Barnette*, 319 U. S. 624, 639; *Prince* v. *Massachusetts*, *supra*, n. 18, p. 164 (dicta); *Marsh* v. *Alabama*, 326 U. S. 501, 504; *Fowler* v. *Rhode Island*, *supra*, n. 40.

99. *Everson* v. *Board of Educ.*, *supra*, n. 92, p. 8; *McCollum* v. *Board of Educ.*, *supra*, n. 20, p. 210; *Zorach* v. *Clauson*, *supra*, n. 17, p. 309.

"First Amendment, made applicable to the states by the Fourteenth," without spelling out how, and consider and construe the language of the First Amendment as though it were directly applicable. None of the cases makes mention of the limitation implicit in the language of the due process clause: "deprive any person of life, liberty or property, without due process of law." We need not now consider whether every "establishment" would constitute a deprivation of liberty or what leeway the phrase "without due process of law" allows for the exercise of legislative discretion in State "establishment" cases,[100] for the court has established due process criteria (in other than religion cases to be sure, but which must nonetheless be considered applicable to such cases since the hypothesis is that they arise under the same clause) which must be held to exclude the school-prayer situation.

Thus, the court has held "from the beginning and uniformly that the Due Process Clause of the Fourteenth Amendment does not apply to the States any of the provisions of the first eight amendments as such."[101] Only those provisions apply which are "implicit in the concept of ordered liberty"[102] and they are applied to prohibit action which is "repugnant to the conscience of mankind"[103] or which violates principles "so rooted in the traditions and conscience of our people as to be ranked as fundamental."[104] While the concept of ordered liberty clearly in-

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100. Wilkinson, The Federal Bill Of Rights And The Fourteenth Amendment, 26 Geo. L. J. 439; Snee, Religious Disestablishment And The Fourteenth Amendment, 1954, Wash. U. L. Q. 371; Sutherland, Due Process and Disestablishment, 62 Harv. L. Rev. 1306; Warren, The New "Liberty" Under The Fourteenth Amendment, 39 Harv. L. Rev. 431; Note, 67 Harv. L. Rev. 1016; Corwin, The Supreme Court As National School Board, 14 Law & Contemp. Prob. 3. Professor Sutherland's views were further expounded before the American Council on Education and are reprinted in its 1957 report: The Study Of Religion In Public Schools; see, also, Pfeffer, *supra*, n. 71, p. 129.

101. *Bartkus* v. *Illinois*, *supra*, n. 57, p. 124.

102. *Palko* v. *Connecticut*, 302 U. S. 319, 325.

103. *Ibid.*, p. 323.

104. *Snyder* v. *Massachusetts*, 291 U. S. 97, 105.

cludes freedom of religion, with respect to both "establishment" and "free exercise", legislative permission for the noncompulsory public recital of prayer cannot be said to be repugnant to the conscience of mankind. Indeed, when one recalls the tradition of prayer in the schools both before and after the inauguration of the public school system, in the Congress [105] and in other "deliberative bodies" and "conventions"; [106] and can point not only to a resolution, passed by Congress on the day after it passed the proposal which became the First Amendment, calling for the designation of "a day of public thanksgiving and prayer" [107] but also to recognition of that tradition going back to process does not proscribe legislative permission to say a Plato [108] and Plutarch,[109] one must conclude that due noncompulsory prayer in the schools. "The traditions and habits of centuries were not intended to be overthrown when that [the Fourteenth] amendment was passed." [110]

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105. *Zorach* v. *Clauson, supra*, n. 17, p. 312.

106. See *Holy Trinity Church* v. *United States, supra*, n. 44.

107. The Senate concurred in the amendments and their being sent to the States on September 25, 1789, Annals Of Congress, Vol. I, col. 88, and concurred in the thanksgiving resolution on September 26, 1789, *ibid.*, col. 90. Objection was made that the resolution covered "a religious matter, and, as such, is proscribed to us", *ibid.*, col. 915. Lincoln, Constitutional History Of New York (1906) 491, details the resolution of the Constitutional Convention of 1777, directing that August 27 of that year be observed throughout the State "as a day of fasting, humiliation and prayer".

108. Timaeus: "All men, Socrates, who have any degree of right feeling, at the beginning of every enterprise, whether small or great, always call upon God", Great Books Of The Western World (1952), Vol. 7, p. 447.

109. Against Colotes The Epicurean, 31, § 1135E: "a city without temples and without gods, making no use of prayer or oaths or divinations, nor sacrifices to obtain blessings or avert evils, there is no one, nor ever will be who has seen." Quoted by Stokes, *supra* n. 35, Vol. I, p. 70.

110. The quotation is from HOLMES' opinion in *Interstate Ry. Co.* v. *Massachusetts*, 207 U. S. 79, 87, a due process "property" case which is otherwise not in point. See, also, *Frank* v. *Maryland*, 359 U. S. 360, 371: "* * * what free people have found consistent with their enjoyment of freedom for centuries is hardly to be deemed to violate due process".

That public prayer does not fit the rubric of due process does not, however, dispose of the matter. Since the court has dealt with the religion problems presented to it as though the First Amendment were directly applicable to the States, we must ascertain the reach of its decisions with respect to prayer in the schools. To do that we must also understand the relationship of the parent and the state to the education of the child.

Meyer v. *Nebraska*[111] invalidated a Nebraska statute that prohibited the teaching of a foreign language in any school below the eighth grade. Holding that the statute denied due process to both teachers and parents, the court said that the Fourteenth Amendment protected the right "to acquire useful knowledge, to marry, to establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men." Though the end, that all might know English, was desirable, it could not be coerced. *Pierce* v. *Society of Sisters*[112] held invalid, as a denial of due process to both private school operators and parents, an Oregon statute requiring that all children attend public school. The court's decision made clear that the state may not "standardize its children by forcing them to accept instruction from public teachers only. The child is not the mere creature of the state * * *."

Both the *Meyer* and the *Pierce* cases recognized, however, the right of the State to prescribe a minimum curriculum, and that right has been upheld against the claim of a parent who sought to send his child to a sectarian school where the secular minimum was not taught.[113] The parent's right to control and direct his child has also been

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111. *Supra*, n. 98, p. 399.

112. 268 U. S. 510.

113. *People* v. *Donner*, 199 Misc. 643, affd. 278 App. Div. 705, affd. 302 N. Y. 857, appeal dismissed 342 U. S. 884. Parents may, however, educate their children at home if curriculum and teaching standards are met. *People* v. *Turner*, 277 App. Div. 317.

held subject to the state's right to require military training at a state university,[114] and to intervene in the interest of health to require that the child be given proper medical attendance,[115] to compel vaccination,[116] or to prohibit the use of young children in evangelical work in violation of the child labor law.[117]

The rule thus to be adduced is that the parent has primary control over his child but that the state, if it acts for the general welfare or the welfare of the child and there is a substanital nexus between the action required and the end sought to be attained, may exercise a paramount control. That is to say, the parent's primary right of control over his child remains subject to the exercise of the State's police power in a proper case.

Investigation of the decisions relating to religious freedom shows that the same rule applies: freedom of religion is a preferred [118] but not an absolute right, upon which the State may impose restrictions if the restrictions are reasonable in relation to the gravity of the danger against which they are intended to protect. Thus the court in ruling on rights to church lands in Virginia after the Revolution, held that the Virginia Constitution did not require abolition of all religious corporations and that "the free exercise of religion cannot be justly deemed to be restrained by aiding with equal attention the votaries of every sect to perform their own religious duties".[119] Again, in *Watson* v. *Jones*,[120] in holding legal tribunals bound by decisions of

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114. *Hamilton* v. *Regents, supra*, n. 98; see, also, *Board of Educ.* v. *Barnette, supra*, n. 98, 632.

115. *People* v. *Pierson*, 176 N. Y. 201, cited with approval in *Prince* v. *Massachusetts, supra*, n. 18, 167.

116. *Jacobson* v. *Massachusetts*, 197 U. S. 11.

117. *Prince* v. *Massachusetts, supra*, n. 18.

118. "Preferred" in the sense that it is guaranteed by the Bill of Rights. The decisions conflict concerning whether freedom of religion is preferred over other constitutionally guaranteed rights.

119. *Terrett* v. *Taylor*, 9 Cranch (13 U. S.) 43, 49. This decision, rendered in 1815 by Justice STORY, is apparently the first touching on religious freedom.

120. 13 Wall. (80 U. S.) 679, 728.

church authority on matters of church law and discipline, the court recognized "the full and free right to entertain any religious belief, to practice any religious principle, and to teach any religious doctrine which does not violate the laws of morality and property, and which does not infringe personal rights." The proviso was applied in both *Reynolds* v. *United States*[121] *and Davis* v. *Beason*[122] to hold that polygamy is a crime despite religious belief to the contrary. In the latter case in explaining the scope and limitation of First Amendment rights, the court said: "The first Amendment to the Constitution, in declaring that Congress shall make no law respecting the establishment of religion, or forbidding the free exercise thereof, was intended to allow every one under the jurisdiction of the United States to entertain such notions respecting his relations to his Maker and the duties they impose as may be approved by his judgment and conscience, and to exhibit his sentiments in such form of worship as he may think proper, not injurious to the equal rights of others, and to prohibit legislation for the support of any religious tenets, or the modes of worship of any sect. The oppressive measures adopted, and the cruelties and punishment inflicted by the governments of Europe for many ages, to compel parties to conform, in their religious beliefs and modes of worship, to the views of the most numerous sect, and the folly of attempting in that way to control the mental operations of persons, and enforce an outward conformity to a prescribed standard, led to the adoption of the Amendment in question. It was never intended or supposed that the Amendment could be invoked as a protection against legislation for the punishment of acts inimical to the peace, good order and morals of society. With man's relations to his Maker and the obligations he may think they impose, and the manner in which an expression shall be made by him of his belief on those subjects, no interference can be per-

121. *Supra*, n. 54.
122. 133 U. S. 333.

mitted, provided always the laws of society, designed to secure its peace and prosperity, and the morals of its people, are not interfered with. However free the exercise of religion may be, it must be subordinate to the criminal laws of the country, passed with reference to actions regarded by general consent as properly the subjects of punitive legislation." [123]

The right thus recognized to adhere to and publicly to express religious beliefs extends to evangelization in the public streets,[124] in the sale of religious tracts,[125] and in public parks,[126] as well as in a company town.[127] In the field of education, it permits the Congress to expend Indian trust funds for the religious education of the Indians since otherwise their freedom of religion would be violated,[128] permits a Jehovah's Witness child to attend school despite a refusal to salute the flag,[129] permits a parent to demand the release of his child for a religious holiday,[130] or, at least, is not violated when release is granted for

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123. *Ibid.*, pp. 342-343.

124. *Cantwell* v. *Connecticut*, *supra*, n. 98; *Jamison* v. *Texas*, 318 U. S. 413; *Largent* v. *Texas*, 318 U. S. 418; see *Kunz* v. *New York*, 340 U. S. 290.

125. *Jones* v. *Opelika*, 319 U. S. 103; *Murdock* v. *Pennsylvania*, *supra*, n. 98; *Follett* v. *McCormick*, 321 U. S. 573.

126. *Fowler* v. *Rhode Island*, *supra*, n. 40; *Niemotko* v. *Maryland*, 340 U. S. 268. The later decision was based on equal protection rather than religious freedom, however.

127. *Marsh* v. *Alabama*, 326 U. S. 501.

128. *Quick Bear* v. *Leupp*, 210 U. S. 50.

129. *Board of Educ.* v. *Barnette*, *supra*, n. 98. The decision overruled *Minersville Dist.* v. *Gobitis*, *supra*, n. 98, which had held the governmental interest in maintaining national unity paramount.

130. *Matter of Zorach* v. *Clauson*, *supra*, n. 19, p. 173. Compare, however, *Ferriter* v. *Tyler*, 48 Vt. 444 holding that a Catholic child could be expelled for refusal to attend on Corpus Christi Day, and *Commonwealth ex rel. School Dist. of Pittsburgh* v. *Bey*, 166 Pa. Superior Ct. 136, upholding the conviction for violation of the compulsory education law of a Mohammedan parent who kept his child out of school on Friday.

such holidays.[131] It also is not violated when the Congress recognizes the religious scruples of conscientious objectors by exempting them from the draft,[132] although clearly such an exemption is a matter of grace and not of constitutional requirement.[133] It does not, however, even on religious grounds, permit withdrawal of children from school in the face of a statute requiring attendance until age 16,[134] nor, as we have seen, sanction violation of a child labor ordinance, the refusal to give instruction in the minimum curriculum required by statute, nor refusal to take a course in military science at the state university.

If we turn our attention to the "establishment" clause, we find that the court has held that there is no constitutional impediment to Congressional repeal of a charter granted under territorial law to the Mormon Church,[135] that the draft exemption of conscientious objectors is not the making of a law respecting an establishment,[136] and that the amendment does not proscribe a contract between the Government of the District of Columbia and a hospital run by an order of Catholic Sisters but incorporated as a separate entity.[137] Its most important decisions on the subject, however, were in the field of education,[138] in *Everson* v. *Board of Education*,[139] *Illinois ex rel. McCollum* v. *Board of Education*[140] and *Zorach* v. *Clauson*.[141]

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131. *Zorach* v. *Clauson*, *supra*, n. 17, p. 313.
132. Selective Draft Law Cases, 245 U. S. 366.
133. *United States* v. *Macintosh*, 283 U. S. 605, 623.
134. *Commonwealth* v. *Beiler*, 168 Pa. Superior Ct. 462.
135. *Mormon Church* v. *United States*, 136 U. S. 1.
136. Selective Draft Law Cases, *supra*, n. 132.
137. *Bradfield* v. *Roberts*, 175 U. S. 291.
138. *Hamilton* v. *Regents*, *supra*, n. 98, concerned education and includes a dictum by Mr. Justice CARDOZO that requiring military instruction at a State university does not violate the "establishment" clause.
139. *Supra*, n. 92.
140. *Supra*, n. 20.
141. *Supra*, n. 17.

The *Everson* case held that a statute authorizing reimbursement of parents for expenditures for bus transportation of their children to school, including Catholic parochial schools, did not constitute an establishment, its purpose being merely to provide safe transportation and thus protect the general welfare. The decision included the now famous dictum that: "The 'establishment of religion' clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and *vice versa*. In the words of Jefferson, the clause against establishment of religion by law was intended to erect 'a wall of separation between Church and State.' "[142] The *McCollum* case relied upon that dictum to invalidate a released time system under which pupils whose parents signed permission cards were given 30 or 45-minute periods of religious instruction on public school premises during school hours by teachers employed by religious organizations though subject to the approval of the public school superintendent. Non-participating children attended a regular class or a study hall during the released time period. The majority opinion

142. *Supra*, n. 92, pp. 15-16. It had earlier been decided in *Cochran* v. *Board of Educ.*, 281 U. S. 370, that a state could make secular textbooks available to both public and parochial schools, but the First Amendment issue was not raised in that case.

refused to accept the argument that the First Amendment forbids only preference of one religion over another, not impartial governmental assistance to all, and held that since public buildings were being used for religious instruction and the state's compulsory education system was used to help provide pupils for the program of instruction carried on by the separate religious sects, the program was unconstitutional. A concurring opinion, written by Mr. Justice FRANKFURTER, reviewed the history of education in colonial times and through the period in which the Fourteenth Amendment was adopted and concluded that separation of the state from the teaching of religion was the accepted principle, and that, by permitting such teaching on school time and property, pressure was put upon children to attend, and a feeling of separation was engendered. Only Justice REED dissented.

The final decision, *Zorach* v. *Clauson*, was rendered four years later. During the intervening period a storm raged in legal and education fields over the *McCollum* ruling.[143] The *Zorach* decision upheld the New York released time system. The court held that the First Amendment does not require separation in every respect, the question in each case being one of degree. It emphasized the religious nature of our people and said that to refuse to accommodate the public service to their spiritual needs would be to prefer nonbelievers over believers. It pointed out that, since the children were released for instruction outside the school, neither religious instruction nor expenditure of public funds was involved and added that there was no evidence that coercion was in fact being used to force or persuade students to take religious instruction. Holding that "[g]overnment may not finance religious groups nor undertake religious instruction nor blend secular and sectarian education nor use secular institutions to force one or some religion on any

143. See Mr. Justice BLACK's dissent, 343 U. S. 306, 317 and his notes 1 and 2.

person. * * * It may not coerce anyone to attend church, to observe a religious holiday, or to take religious instruction," [144] the court concluded that a system whereby the public schools do no more than accommodate schedules to a program of outside religious instruction does not violate the amendment.

The *Zorach* decision constitutes a retreat from both *Everson* and *McCollum*: where *Everson's* broad dictum, reaffirmed in *McCollum*, outlawed aid to all religions, *Zorach* recognized that government can, without violation accommodate all religions; where *McCollum* invalidated an alliance between religion and the compulsory education system, *Zorach* upheld the same alliance, for the same purpose, though in a different place. The *Everson* holding, that the expenditure of tax funds for a general welfare purpose was not invalidated because religious groups also benefited, was extended by *Zorach* to validate minimal [145] use of the tax supported school system for a religious purpose, as an accommodation of the spiritual needs of our people. The *McCollum* holding, that religious instruction as a part of a compulsory school system is unconstitutional without regard to whether actual compulsion operates [146] was adhered to, but the fact situation in *Zorach* was held sufficiently different in degree to warrant sanction of the accommodation. This would appear to be the reverse side of the "free exercise" coin:

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144. 343 U. S. 306, 314.

145. The court noted both that the cards were printed by the religious organizations (p. 309) and that the school's truancy system was not used to enforce attendance (p. 311, n. 6).

146. The court found it unnecessary, in view of its conclusion, to consider whether actual pressure existed, 333 U. S. 203, 207, n. 1. The trial court had found as a fact that it did not, Sutherland, *supra*, n. 100, 62 Harv. L. Rev. 1306, 1313, citing *McCollum* Record, p. 69. The court did not emphasize the sectarian nature of the instruction, though Justice DOUGLAS, in An Almanac Of Liberty (1954), 261, calls the use of public school rooms and machinery for such instruction "the fatal feature".

"establishment" prohibits any compulsion in matters of religion that operates directly on the individual, but prohibits indirect compulsion (as through the use of general tax funds for a religious purpose) only if the nexus between government and religion thus produced is too close. The democratic nature of our Government precludes the imposition of sanctions in the field of religion, the religion [sic] nature of the governed sanctions the inclusion of religion in the processes of democratic life; the dividing line between permitted accommodation and proscribed compulsion is a matter of degree, to be determined anew in each new fact situation.

Despite an apparent contradiction in terms, the First Amendment's "establishment" and "free exercise" clauses clearly protect the nonbeliever as well as the believer in God. This is borne out by decisions of the Supreme Court, by utterances of the Founding Fathers and by a provision of the Constitution itself. Thus the *Everson* decision states that the First Amendment "requires the state to be a neutral in its relations with groups of religious believers and non-believers",[147] the *McCollum* ruling protected the rights of an atheist, and the *Zorach* decision, by refusing to prefer "those who believe in no religion over those who do believe"[148] recognized but refused priority to the nonbeliever's right. The principle thus stated is implicit in the provision of article VI of the United States Constitution that "no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States". It also was the point of view of Jefferson and Madison. Thus, Jefferson stated in his Republican Notes

147. 330 U. S. 1, 18.

148. 343 U. S. 306, 314. The principle was also recognized in the *Gobitis* case, *supra*, n. 98, p. 593, in *Plywacki* v. *United States*, 205 F. 2d 423, which reversed, on the government's confession of error, the District Court's refusal to naturalize an atheist, in *Lewis* v. *Board of Educ.*, 157 Misc. 520, 526, mod. 247 App. Div. 106, appeal dismissed 276 N. Y. 490 and in *Matter of Lewis* v. *Allen*, 5 Misc. 2d 68.

on Religion [149] that "it does me no injury for my neighbor to say there are twenty Gods, or no God" and Madison incorporated in the fourth point of his Memorial and Remonstrance the statement that: "Whilst we assert for ourselves a freedom to embrace, to profess and to observe the Religion which we believe to be of divine origin, we cannot deny an equal freedom to those whose minds have not yet yielded to the evidence which has convinced us." Indeed, the only suggestions to the contrary are the statement, in the course of debate on the First Amendment, by Representative Huntington, that he hoped that the amendment would be made in such a way as to secure rights of conscience "but not to patronise those who professed no religion at all",[150] and a concurring opinion stating that freedom "of" religion does not mean freedom "from" religion.[151] The opinion's apothegm is true only in a most limited sense. Every individual has a constitutional right personally to be free from religion, but that right is a shield, not a sword, and may not be used to compel others to adopt the same attitude. Mr. Huntington's remark may be construed as suggesting merely that nonbelievers are not to be preferred over believers. To the extent that it may be read as suggesting that nonbelievers have any lesser rights, it is inconsistent with the views of Madison and Jefferson referred to above and with the fact that, at the time that it was uttered, less than 20% of the population of New England (the best churched section of the colonies) had any formal connection with organized religion.[152] Such an isolated statement,

149. *Supra*, n. 93. See, also, his Notes on Locke, reprinted in The Papers Of Thomas Jefferson (Boyd ed.) Vol. I, p. 548.

150. Annals of Congress, Vol. I, col. 731; see, also, Stokes, *supra*, n. 35, Vol. I, p. 543.

151. *Gordon* v. *Board of Educ.*, 78 Cal. App. 2d 464, review denied by the California Supreme Court; see Pfeffer, *supra*, n. 71, p. 341.

152. Sweet, Religion In Colonial America (1942), p. 335; see, also, Stokes, *supra*, n. 35, Vol. I, p. 229, which cites an article by Sweet giving the overall figure as 1 in 8 and another by Davis putting the ratio at 1 in 20 to 25; and Cobb, The Rise Of Religious Liberty In America (1902), 16.

nowhere shown to have been brought to the attention of those who ratified the amendment, cannot be considered the "sense of the nation".

The principles of decisional law so far considered have been stated in Federal cases concerned with the United States Constitution. Except for the few incidental references to prayer hereinbefore noted, however, nothing in those cases has related to prayer in the schools or the closely kindred subject of the Bible in the schools.[153] Before attempting to apply the rules so far adduced to the fact situation of the present case, State decisions relating to prayer, the Bible and baccalaureate services must be considered.

The use of prayer in the schools either separately or together with the Bible has been upheld in ten[154] and struck down in seven[155] State decisions. Of the cases concerned

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153. *Doremus* v. *Board of Educ., supra*, n. 20, dismissed for want of standing an appeal from a judgment upholding reading of the Bible in New Jersey schools; *Tudor* v. *Board of Educ.*, 348 U. S. 816, denied certiorari with respect to a New Jersey judgment holding unconstitutional the distribution of Gideon Bibles through the schools; *Washington ex rel. Clithero* v. *Showalter*, 284 U. S. 573, dismissed appeal with respect to a judgment holding that the schools could not be required to hold opening Bible reading exercises. The Bible question under a compulsory statute is now before a three-judge Federal Court in Philadelphia for decision, in *Schempp* v. *School Dist. of Abington Township*, *New York Times*, March 13, 1959, p. 14, col. 2.

154. *Spiller* v. *Inhabitants of Woburn*, *supra*, n. 45; *Moore* v. *Monroe*, *supra*, n. 45; *Billard* v. *Board of Educ.*, 69 Kan. 53; *Church* v. *Bullock*, 104 Tex. 1; *Hackett* v. *Brooksville Graded School Dist.*, *supra*, n. 45; *Knowlton* v. *Baumhover*, 186 Iowa 691; *Wilkerson* v. *City of Rome*, 152 Ga. 762; *Doremus* v. *Board of Educ.*, 5 N. J. 435, appeal dismissed 342 U. S. 429; *Commonwealth* v. *Renfrew*, 332 Mass. 492; *Carden* v. *Bland*, 199 Tenn. 665. Cases such as *North* v. *Board of Trustees*, 137 Ill. 296 upholding compulsory chapel at a State university are not included since a college education is not compulsory.

155. *State ex rel. Freeman* v. *Scheve*; *People ex rel. Ring* v. *Board of Educ.*; *Herold* v. *Parish Bd. of School Directors*, all *supra* n. 45; *State ex rel. Conway* v. *District Bd.*, 162 Wis. 482 (dicta); *State ex rel. Finger* v. *Weedman*, *supra*, n. 45; 1909-1910 Atty. Gen. (Wash.) 135; 25 Cal. Ops. Atty. Gen. 316 (1955).

solely with the reading of the Bible, nine[156] have upheld and two[157] have struck down Bible reading as a devotional exercise.[158] It has also been held that a school board may not be required to hold Bible reading exercises,[159] that school baccalaureate services and graduation exercises may be held in a church,[160] that the school system may not be used as a means of distributing religious pamphlets or Gideon Bibles,[161] and that a Board of Education may not display in the classrooms of its schools a plaque purporting to set forth the Ten Commandments.[162] Most of the above decisions have been made under State constitutional provisions prohibiting sectarian teaching. They conflict concerning whether the Bible or the Lord's Prayer is sectarian. Many of the cases upholding such practice have pointed to the fact that the regulation involved did not

156. *Donahoe* v. *Richards*, *supra*, n. 64; *Hart* v. *School Dist.*, 2 Lanc. L. Rev. 340; *Nessle* v. *Hum*, 1 Ohio N. P. 140; *Stevenson* v. *Hanyon*, 4 Pa. Dist. Rep. 395; *Curran* v. *White*, 22 Pa. Co. Ct. R. 201; *Pfeffer* v. *Board of Educ.*, 118 Mich. 560; *Kaplan* v. *Independent School Dist.*, 171 Minn. 142; *People ex rel. Vollmar* v. *Stanley*, 81 Col. 276; *Lewis* v. *Board of Educ.*, *supra*, n. 148.

157. *State ex rel. Weiss* v. *District Bd.*, 76 Wis. 177; *State ex rel. Dearle* v. *Frazier*, 102 Wash. 309.

158. Use of the Bible generally for other than sectarian instruction was permitted in *State ex rel. Freeman* v. *Scheve*, *supra*, n. 45, and *People ex rel. Vollmar* v. *Stanley*, *supra*, n. 156, and its use as a library book was sanctioned in *Evans* v. *Selma Union High School Dist.*, 193 Cal. 54.

159. *Board of Educ. of Cincinnati* v. *Minor*, 23 Ohio 211; *State ex rel. Clithero* v. *Showalter*, 159 Wash. 519, appeal dismissed 284 U. S. 573.

160. *State ex rel. Conway* v. *District Bd.*, *supra*, n. 155; *Miller* v. *Cooper*, 56 N. M. 355; compare *Matter of Dargin*, *supra*, n. 47.

161. *Miller* v. *Cooper*, *supra*, n. 160; *Tudor* v. *Board of Educ.*, 14 N. J. 31, cert. denied 348 U. S. 816.

162. *Matter of Belman*, 78 N. Y. St. Dept. Rep. 10. The version used was drawn from all but would have conformed to none of the versions used by the different faiths.

make it compulsory;[163] but regulations permissive in terms have been struck down because of the compulsion and discrimination involved in having to ask to be excused.[164]

Most of the decisions make no reference to the First and Fourteenth Amendments, a few make passing reference to them but rest decision primarily on State provisions,[165] only four discuss the effect of the amendments.[166] *People ex rel. Vollmar* v. *Stanley* held that under the Fourteenth Amendment children cannot be compelled, against their parents' wishes, to take instruction not essential to good citizenship and that since the morality of the Bible could be taught by other methods, Bible reading was not essential and, therefore, could not be made compulsory. It then discussed, as a State constitutional question "with which the United States Constitution has nothing to do," whether Bible reading had to be excluded altogether. It concluded that noncompulsory reading of the Bible without comment

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163. *Moore* v. *Monroe*; *Hackett* v. *Brooksville Graded School Dist.*, both *supra*, n. 45; *Church* v. *Bullock*; *Wilkerson* v. *City of Rome*, both *supra*, n. 154; *Hart* v. *School Dist.*; *Pfeiffer* v. *Board of Educ.*; *People ex rel. Vollmar* v. *Stanley*; *Kaplan* v. *Independent School Dist.*, all *supra*, n. 156.

164. *State ex rel. Weiss* v. *District Bd.*, *supra*, n. 157; *People ex rel. Ring* v. *Board of Educ.*; *Herold* v. *Parish Bd. of School Directors*, both *supra*, n. 45; *Tudor* v. *Board of Educ.*, *supra*, n. 161; see *Knowlton* v. *Baumhover*, *supra*, n. 154.

165. *Commonwealth* v. *Renfrew*, *supra*, n. 154, contained a footnote reference to *McCollum*, *supra*, n. 20, and *Zorach*, *supra*, n. 17. *Carden* v. *Bland*, *supra*, n. 154, found *Everson*, *supra*, n. 92, and *McCollum* irreconcilable and based the decision primarily on State provisions; *Miller* v. *Cooper*, *supra*, n. 160, referred to *McCollum*, *Doremus*, *supra*, n. 154, and *Zorach*, but said they were not helpful in reaching a decision; *Lewis* v. *Board of Educ.*, *supra*, n. 148, p. 528, said the Greater New York Charter provision in question, section 1151, could not violate the Federal Constitution because it contained the proviso that nothing herein "shall be so construed as to violate the rights of conscience, as secured by the constitution of this State and of the United States."

166. *People ex rel. Vollmar* v. *Stanley*, *supra*, n. 156; *Doremus* v. *Board of Educ.*, *supra*, n. 20; *Tudor* v. *Board of Educ.*, *supra*, n. 161, and a 1955 California Attorney General's Opinion, *supra*, n. 46.

was not sectarian, though the conclusion might be different if it were shown that sectarian sections of the Bible were read, and issued a writ requiring revocation of the order of compulsory attendance. *Doremus* v. *Board of Education*, held that under the applicable statute the practice of reading the Bible and reciting the Lord's Prayer was permissive and not compulsive; that the sense of the First Amendment does not prohibit the recognition of God; and that the practice did not constitute sectarian instruction or worship or set up religious instruction or religious worship in aid of one or more religions or constitute the establishment of religion or prohibit the free exercise of religion. *Tudor* v. *Board of Education*, decided by the same court, struck down the distribution of Gideon Bibles through the schools. The decision reviewed the history of the adoption of the First Amendment, and the religious motivation of the colonists, and held that the distribution of the New Testament constituted a religious preference in violation of the First Amendment. It distinguished the *Doremus* ruling and held the Gideon Bible to be a sectarian book. It further held that the practice involved could not be viewed as merely an accommodation, particularly in view of the testimony of psychiatrists that the effect of distribution under the authority of the school would be to create a subtle pressure on the child and to create tensions among religious groups. Finally, the Attorney General of the State of California has held that the First Amendment prohibits recitation of a prayer identical with the prayer involved in the instant case except that in place of the word "parents" it substituted the word "home". His decision reviewed the Federal cases and concluded that a public school teacher may not be required to participate in such a prayer exercise[167] and that, in any event, the use of the prayer would be unconstitutional as a violation of the rights of the children of atheist and agnostic parents. To require the

167. A question not involved in the instant case since no teacher has objected.

children to participate in prayers contrary to the belief of their parents would, he held, be a material encroachment on the separation of church and state, and the right to be absent he considered an inadequate protection from the very real, though subtle, pressure which the indorsement of school and teacher would produce upon the child.

How do the above decisions and the principles to be drawn from them affect the instant case? The *Zorach* case holds that the Constitution does not require separation in every and all respects and, as we have seen, constitutional history confirms a tradition of prayer, including prayer in the schools. Even without the constitutional history, some form of prayer would appear to fall within the realm of permissible accommodation. Despite the board's "spiritual heritage" argument, the prayer under consideration cannot be deemed religious instruction. It is recited during opening exercises rather than as a part of any instructional period. It is phrased in traditional prayer form rather than in any form normal for instructional materials. Essentially, it is devotional and, as such, is designed to be repeated daily, without change, over a 12-year school course. Twenty-two words in length, and thus taking substantially less than one minute to recite and a good deal less time for recitation than does the legislative prayer deemed by *Zorach* to be within permissible constitutional degree, the instant prayer, at least when its recitation is limited to daily exercises at the opening of school, must be classified as outside *McCollum's* proscription of religious instruction and within *Zorach's* sanction as an accommodation.[168]

As *Zorach* recognizes, however, the prayer exercise would nonetheless be objectionable if there were direct

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168. Compare *Baer* v. *Kolmorgen*, *supra*, n. 19, which approved as an accommodation the display of a creche on the school lawn during Christmas recess, *Matter of Lewis* v. *Allen*, *supra*, n. 148, which refused to order discontinuance of the words "under God" in the pledge of allegiance, and Konvitz, Fundamental Liberties Of A Free People (1957), 75. For both policy and legal arguments pro and con concerning the Regent's prayer, see Pfeffer, *supra*, n. 71, p. 394.

compulsion. The board's resolution of July 8, 1958, is framed in mandatory terms. While the answering affidavit states that direction has been given that no child shall be coerced or in any manner persuaded to participate, there is no indication that either the resolution or the direction has been brought to the attention of either the parents or the children. This is not a situation, such as pertained in the *Zorach* case, where prior parental consent has been obtained. In view of that fact and in view of the fact that a school child cannot be expected to understand that a resolution phrased in mandatory terms may be violated with impunity[169] or that such a child, not advised of his right to do so, will not normally be sufficiently aggressive to claim his constitutional privilege not to participate,[170] the court holds that the resolution of July 8, 1958, in its present form, is objectionable. The matter will, therefore, be remanded to the board for modification of its resolution to establish a procedure whereby the parents of each child are advised of the adoption of the resolution calling for the saying of prayer, of the wording of the prayer and of the procedure to be followed when it is said and requested to indicate whether the child shall or shall not participate in the exercise.[171]

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169. Indeed it can hardly be argued, in connection with a campaign to teach moral values, including "respect for lawful authority and obedience to law" (Regent's Statement, *supra*, n. 5), that the mere fact that no punishment is provided means that there is no compulsion to an order from the School Board, phrased in mandatory terms. Jefferson's letter to Miller, *supra*, n. 42, accords with this view.

170. Cf. Justice FRANKFURTER'S *McCollum* opinion, 333 U. S. 203, 227 (*supra*, n. 20). "The law of imitation operates, and nonconformity is not an outstanding characteristic of children."

171. While some slight cost will be involved in obtaining such an expression from parents, this alone would not give petitioners standing to sue, *Doremus* v. *Board of Educ.*, *supra*, n. 20, and, despite *Zorash's* reservation of the point, is not considered of a sufficient degree of importance to invalidate the practice. See *People ex rel. Lewis* v. *Graves*, 245 N. Y. 195. Particularly is this so since, as we shall see, such an expression is also necessary to protect "free exercise" rights.

Since the matter is, therefore, to be remanded to the board, it is not necessary to hear petitioners' evidence on the subject of coercion. In any event, to the extent that petitioners seek to rely on the pressure resulting from the school's apparent sanction of prayer and from the necessity of applying for release from the exercise, as distinct from overt acts of the teachers or other school authorities, the evidence would not be material. To recognize "subtle pressures" as compulsion under the amendment is to stray far afield from the oppressions the amendment was designed to prevent;[172] to raise the psychology of dissent, which produces pressure on every dissenter, to the level of governmental force;[173] and to subordinate the

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172. Jefferson's Notes on Virginia, *supra*, n. 93, refers to "coercion" and innocent people "burnt, tortured, fined and imprisoned" and his Act for Establishing Religious Freedom enacted that "no man shall be compelled to frequent or support any religious worship, place or ministry whatsoever, nor shall be enforced, restrained, molested or burthened in his body or goods, nor shall otherwise suffer on account of his religious opinions or belief"; Madison's Memorial, to "force and violence", "torrents of blood", "attempts to enforce by legal sanctions"; Roger Williams' Bloudy Tenent, Of Persecution For Cause of Conscience (1644) was directed against persecution and blood spilt in the attempt to enforce uniformity of religion; Locke's A Letter Concerning Toleration (1689) was concerned that "no violence nor injury is to be offered" (Crowder ed., p. 30). Note also the reference in the quotation from *Davis* v. *Beason*, *supra*, n. 122, to "oppressive measures adopted, and the cruelties and punishments inflicted."

173. Mr. Justice FRANKFURTER's *McCollum* opinion, *supra*, n. 20, p. 277, which concluded that "[t]he result is an obvious pressure upon children to attend" should be compared with Mr. Justice JACKSON's opinion in the same case (p. 233): "it may be doubted whether the Constitution which, of course, protects the right to dissent, can be construed also to protect one from the embarrassment that always attends nonconformity, whether in religion, politics, behavior or dress." Jefferson's reference in his letter to Miller, *supra*, n. 42, to "some degree of proscription, perhaps in public opinion" in the issuance of a Thanskgiving proclamation is also to be compared with the Supreme Court's recognition in *Richardson* v. *Goddard*, 23 How. (64 U. S.) 28, that such a proclamation involved no legal compulsion. For Professor Sutherland the problem is "when embarrassment reaches the point of outrage", American Council of Education Report, *supra*, n. 100, pp. 58, 62.

spiritual needs of believers to the psychological needs of non-believers. The equality of treatment which the amendment was designed to produce does not require, indeed proscribes, so doing.

This is not to say that the rights accorded petitioners and their children under the "free exercise" clause do not mandate safeguards against such embarrassments and pressures. It is enough on this score, however, that regulations, such as were adopted by New York City's Board of Education in connection with its released time program, be adopted, making clear that neither teachers nor any other school authority may comment on participation or nonparticipation in the exercise nor suggest or require that any posture or language be used or dress be worn or be not used or not worn. Nonparticipation may take the form either of remaining silent during the exercise, or if the parent or child so desires, of being excused entirely from the exercise.[174] Such regulations must also make provision for those nonparticipants who are to be excused from the prayer exercise.[175] The exact provision to be made is a matter for decision by the board, rather than the court, within the framework of constitutional requirements. Within that framework would fall a provision that prayer

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174. The brief of *Amicus Curiae* recognizes this. It states (p. 13): "Schools are expected and, on appeal to the Commissioner of Education under Section 310 of the Education Law, in a proper case, would be ordered to accommodate each child according to his conscience and his parents' wishes, by either allowing him to leave the room, or to remain silent throughout the ceremony, or a proper part thereof, as the case may be." The appeal procedure, however, is not sufficient under a law phrased in mandatory terms. There must be regulations setting forth the rights of parent and child before compulsion has an opportunity to operate.

175. While the result is separation, it is separation for the purpose of according to each the right to follow his own religious prepossessions, and in furtherance of spiritual needs which may constitutionally be accommodated. For these reasons, *Brown* v. *Board of Educ.*, *supra*, n. 58, p. 495, holding racially segregated educational facilities "inherently unequal" is distinguishable.

participants proceed to a common assembly while nonparticipants attend other rooms, or that nonparticipants be permitted to arrive at school a few minutes late or to attend separate opening exercises, or any other method which treats with equality both participants and nonparticipants.[176]

While for the reasons stated, the matter is to be remanded to the board, the court should also consider for the board's guidance on remand the questions raised by petitioners with respect to divisiveness, sectarianism and the New York State Constitution. One of the purposes, it has been said, for adoption of the First Amendment was "to keep bitter religious controversy out of public life by denying to every denomination any advantage from getting control of public policy or the public purse."[177] Division over compulsory unification through public school programs was referred to in the *Barnette* decision[178] and the vital necessity to keep divisive forces out of the schools was argued in the *McCollum* concurring opinion[179] in considering whether the practices involved could be coerced. But what was involved in each situation was compulsion;[180] divisiveness and consciousness of religious differences have

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176. Of course, permitting attendance at prayer outside school with excusal of the lateness of those so doing would fall squarely within the *Zorach* case, and the Superintendent's plan for having prayer said a few minutes before 9:00 A. M. would also be acceptable. Of interest, too, is Canon Stokes suggestion, Vol. III, p. 684, of a period of silent prayer, a practice which he notes (Vol. I, p. liv) the United Nations has adopted for its meetings.

177. Mr. Justice JACKSON, dissenting, in *Everson*, 330 U. S. 1, 27, *supra*, n. 92 at p. 680.

178. 319 U. S. 624, 641, *supra*, n. 98 at p. 681.

179. 333 U. S. 203, 231, *supra*, n. 20 at p. 666. See, also, *Tudor* v. *Board of Educ.*, *supra*, n. 161 at p. 691.

180. Thus Madison's 11th point in the Memorial inveighed against the bill, "Because, it will destroy that moderation and harmony which the forebearance of our laws to intermeddle with Religion, has produced amongst its several sects. Torrents of blood have been spilt in the old world, by vain attempts of the secular arm to extinguish Religious discord, by proscribing all difference in Religious opinions."

not been raised to the level of constitutional absolutes.[181] At most, division may be considered as one of many criteria to be used in determining whether a particular practice is within or without the Constitution. With respect to prayer, the constitutional history above reviewed shows a widespread tradition of prayer. And the existence of religious differences is one of the facts of life of which school children are every day made aware by absences for religious holidays, differences in clothing, in dietary habits and in other observances.[182] Religious tensions are part of everyday living and competition among creeds is advantageous.[183] "Our heterogeneous society with its different

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181. Judge DESMOND considered divisiveness and coercion "predilections, not questions of law", *Matter of Zorach* v. *Clauson*, *supra*, n. 19, p. 177. In any event petitioner's offered proof of division in this school district over this prayer could not be material, for the ultimate conclusion would then have to be that the Constitution permits in a community in which divisiveness cannot be shown what it prohibits where there is a showing of divisiveness. There is no such constitutional principle.

182. The reference in the *Barnette* case, *supra*, n. 98, to division over requiring flag salute may be compared with the Report on the Religion and Education Conference for Connecticut, Massachusetts and Rhode Island issued July 27, 1959 by the National Citizens Council for Better Schools. That report lists as a factor which gives rise to "deep tensions" that "Jehovah's Witnesses refuse to allow their children to salute" (p. 3).

183. Jefferson's Notes, *supra*, n. 93, stated "Difference of opinion is advantageous in religion. The several sects perform the office of a *censor morum* over each other". Hunt, James Madison and Religious Liberty, 1 Ann. Rep. Am. Hist. Assn. (1901), 165, 170, records Madison's fondness for repeating Voltaire's aphorism that: "If one religion only were allowed in England, the Government would possibly became arbitrary; if there were two, the people would cut each other's throats; but as there are such a multitude, they all live happy and in peace", and Madison's view that the security for religious rights was the multiplicity of sects. See also Pfeffer, Creeds In Competition (1958), particularly chapter 9, and the *New York Times*, April 3, 1959, p. 19, col. 5, reporting agreement among the speakers at the annual meeting of the Associated Church Press "that religious tension was a healthy adjunct to a democratic society."

religious groups demands the development of respect for differing points of view and for the right of others to believe differently." [184] The genius of the American experiment has been not a lack of difference in point of view, but absolute equality in matters of thought and belief despite all differences.

Petitioners contend, nonetheless, that there is not equality of treatment because the prayer is sectarian. Without analyzing in detail the meaning of the word "sectarian" as construed by the cases discussed above, it may be stated that the instant prayer which invokes "Almighty God" asknowledges "dependence" upon Him and "asks blessings" cannot be considered sectarian in the sense that it prefers any particular sect. The fact that the prayer and the manner of its saying may not conform to all the tenets of the Jewish, Unitarian and Ethical Culture groups, or of any other group, does not mean that the prayer is sectarian. Nor can it be said in any true sense that the granting of legislative permission to say a prayer as an opening exercise in a school is a preference of believers over nonbelievers when the saying of the prayer is not made compulsory. To put it shortly, since each is free to follow his own predilection with respect to prayer, to participate in a prayer exercise or to refuse to do so, the exercise cannot be deemed preferential.

For the same reason, that is, that the saying of the prayer is not made compulsory, the particular form of prayer adopted by the respondent board in the instant case cannot be considered to be invalid as the prescription of a mode of worship. If it be admitted that the board may constitutionally permit the saying of a prayer as an opening exercise in a school, then it must either adopt a form

184. The quotation is from the conclusion of the Report on the Religion and Education Conference, *supra*, n. 182, p. 11, which also stated that: "The conference groups agreed that children should be taught a basic respect for others and that learning an attitude of tolerance should be a part of their formal religious as well as secular training."

of prayer or else leave to the discretion of the teacher or a student, if students are used to lead the exercise, the determination of what prayer is to be said. The latter procedure could, of course, result in the use in the schools of prayers identifiable as those of a particular sect, therefore preferential, and, therefore, prohibited. In order to prevent such a possibility and to seek the widest possible acceptance, the board may adopt a form of prayer so long as it does not adopt the prayer of any sect or a prayer sectarian in concept and does not make recitation of the adopted form compulsory.

This is not to say, however, that the board may be compelled to permit the saying of a prayer in the schools. The cases discussed above make clear that though the "free exercise" clause allows wide latitude to the individual in public expression of his belief and public demonstration of his worship, the freedom is not absolute. No sacred cow may impede the flow of traffic so necessary to the general welfare; no belief in polygamy, save the believer from prosecution. The state may determine the time and place, and within the limits suggested above, the manner of the exercise of such freedom, when it acts to protect its own legitimate interests or that of other citizens. The state may, therefore, in determining the curriculum of its schools, exclude any form of devotional exercise. It follows that the board's affirmative defense that petitioners in seeking to interfere with the saying of the prayer by the children of others are acting in violation of the Federal and State Constitutions must be dismissed.

Petitioners' final contention is that the saying of the prayer violates section 3 of article I of the State Constitution. That section reads as follows: "The free exercise and enjoyment of religious profession and worship, without discrimination or preference, shall forever be allowed in this state to all mankind; and no person shall be rendered incompetent to be a witness on account of his opinions on matters of religious belief; but the liberty of conscience

hereby secured shall not be so construed as to excuse acts of licentiousness, or justify practices inconsistent with the peace or safety of this state." The language of the provision is no broader than the construction given the Federal "free exercise" clause and the cases construing the State provision[185] are entirely consistent with the conclusion reached herein. And while section 4 of article XI of the State Constitution, which prohibits public aid to a school "in which any denominational tenet or doctrine is taught", has not been argued, the conclusion may be stated that since the instant prayer is not "denominational" that section would not exclude it.[186]

In summary, the petition, as amended, is held legally sufficient, the board's defenses are held insufficient and are dismissed, the petitioners' demand for a jury trial is denied for the reason that there is no triable issue of material

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185. *Lewis* v. *Board of Educ.*, *supra*, n. 148, upheld Bible reading in New York City schools; *People ex rel. New York League for Separation of Church and State* v. *Lyons*, 173 Misc. 821, held the erection of a prison chapel and employment of a chaplain not to be a violation; *Matter of Lewis* v. *Allen*, *supra*, n. 148, found no violation in school recitation of the pledge of allegiance with the words "under God"; and *Baer* v. *Kolmorgen*, *supra*, n. 19, allowed display of a creche on a school lawn during school Christmas recess.

186. The first three cases cited in n. 185 also interpret this section In addition see *O'Connor* v. *Hendrick*, 184 N. Y. 421, holding that teachers wearing religious garb, and *Smith* v. *Donahue*, 202 App. Div. 656, holding that the furnishing of textbooks to parochial school children did violate the section, and *People ex rel. Lewis* v. *Graves*, *supra*, n. 171, holding released time not violative. *Judd* v. *Board of Educ.*, *supra*, n. 23, which invalidated use of public funds for bus transportation of parochial students was changed by the 1938 amendment to the section. Also of interest is the Report of the Committee on Education and Funds Pertaining Thereto to the 1894 Constitutional Convention (Revised Record Of The Constitutional Convention Of The State Of New York, May 8, 1894 To September 29, 1894 [1900], Vol. 5, p. 693). The committee (p. 706) recognized that its words could not bind a court, but stated its opinion to be that the section could not "be taken to prohibit the reading of the Bible in the public schools."

fact, and the request for mandamus is, as a matter of discretion, denied[187] but the matter is remanded to the board for further proceedings not inconsistent with the foregoing. An order to that effect may be settled on notice.

The court wishes to thank all counsel for the excellent presentation not only in oral argument, but in the original and supplemental briefs. It is, perhaps, not amiss to conclude this opinion with the repetition of a sentence from the decision of Superintendent Spencer referred to in the beginning. Written 120 years ago, the following statement, in the court's view, most completely conforms to the requirements of both constitutional law and of reason: "The simple rule, so to exercise your own rights as not to infringe on those of others will preserve equal justice among all, promote harmony, and insure success to our schools."

OPINION OF THE APPELLATE DIVISION

Per Curiam. The purpose of this article 78 proceeding is to compel the local school board to discontinue its practice of requiring daily recitation in the schools of the "Regents' Prayer", which reads as follows: "Almighty God, we acknowledge our dependence upon Thee, and we beg Thy blessings upon us, our parents, our teachers and our country."

The Justice at Special Term, in a comprehensive opinion (*Matter of Engel* v. *Vitale*, 18 Misc. 2d 659), held that the pleadings do not raise a triable issue as to any material fact. He denied the petition as a matter of discretion; and he remanded the matter to the school board for further proceedings consistent with his opinion.

The further proceedings relate to the adoption of certain safeguards intended to eliminate any element of coercion or compulsion upon the student with respect to the daily recitation of the prayer.

We agree with the views expressed in the opinion of the learned Justice at Special Term.

Hence, the order insofar as appealed from should be affirmed, without costs, upon said opinion.

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187. *Matter of Ahern* v. *Board of Supervisors*, 6 N. Y. 2d 376; *Matter of Andresen* v. *Rice*, 277 N. Y. 271, 282.

BELDOCK, J. (concurring in part and dissenting in part). While I agree that the decretal provisions of the order should be affirmed, I disagree as to the grounds stated by the Justice at Special Term for his determination, and I disagree as to the nature of the further proceedings suggested by him in his opinion.

In my opinion the order should be affirmed, not upon the grounds stated by said Justice, but solely on the grounds that the voluntary recital of the prayer is not an act of religious training or teaching; that under proper safeguards against compulsion it is permissible; and that it violates neither the First Amendment to the Federal Constitution nor decisional law.

It is also my opinion that the order should be modified so as to remand the proceeding to the local Board of Education for further action consistent with my views as hereinafter expressed.

The question to be decided is whether an order of the local Board of Education directing the recitation of a prayer in the public schools at the opening of each school day, following the salute to the flag, violates the Federal and State constitutional guarantees of religious freedom, even though such order be amended and administered so as to make the recitation optional with each student.

The prayer, known as the "Regents' Prayer", is sponsored by the Board of Regents of the State of New York. It contains 22 words; requires less than one minute to recite; is not accompanied by any comment; and reads as follows: "Almighty God, we acknowledge our dependence upon Thee, and we beg Thy blessings upon us, our parents, our teachers and our country." The recitation is led either by the teacher or by a student designated by the teacher, with the other class students repeating the prayer.

The First Amendment to the Federal Constitution forbids the making of laws "respecting an establishment of religion, or prohibiting the free exercise thereof". The State Constitution (N. Y. Const., art. I, § 3) provides that the "free exercise and enjoyment of religious profession

and worship, without discrimination or preference, shall forever be allowed in this state to all mankind".

The question as to whether a school board's order requiring the teacher, within the classroom, to cause a prayer to the Almighty to be recited, violates the First Amendment to the Federal Constitution and corresponding provisions of the State Constitution (as well as the question of selected Bible reading in the classroom), has been the subject of considerable controversy in this country for more than a century. The question is of grave concern to all. The judicial pronouncements thereon are in conflict.

I have no doubt that the *compulsory* recitation of a prayer in the classroom violates the constitutional provisions. I have concluded, however, that the prayer here involved (which I agree is nonsectarian and nondenominational), does not constitute religious teaching and, if voluntary and circumscribed by proper safeguards, does not violate the constitutional proscription of laws "respecting an establishment of religion". Nor do I find the prayer to be in conflict with recent decisional law on the related subject of teaching sectarian religion during the "released time" period.

From the point of view of policy I fully subscribe to the statement of principle in the Regents' Statement of Moral and Spiritual Training in the Schools, adopted November 30, 1951, to wit: "Belief in and dependence upon Almighty God was the very cornerstone upon which our Founding Fathers builded." It cannot be gainsaid that, above all things, it is essential for our children to be exposed to programs which emphasize the moral and spiritual heritage which is America's and to be inspired by the examples of their ancestors toward a greater respect for lawful authority, for love of God and respect for parents and home. However, we are not now dealing with a matter of policy, but with one of power.

The basic issue here deals with the power of the school board to *direct* the recital of this prayer *on* school premises

under the supervision of the school teachers. It is not disputed by the litigants that the prayer is of a religious nature. The main dispute is as to whether it is religious instruction and whether it is said by the students under compulsion.

The Justice at Special Term pointed out that (18 Misc. 2d 659, 672) "the State's interest in familiarizing students with the religious nature of our heritage would not justify the use of prayer as a vehicle for imparting that knowledge since there are other equally effective and constitutionally uninhibited means of achieving that end."

The Justice at Special Term also declared (p. 673) that if the purpose is to inculcate in the students a love of God, then "as an exercise required of all pupils, it would constitute religious instruction in violation of the 'establishment' clause", and as a permissive exercise, unless participating children were free "to adopt any posture, use any gesture, wear any attire, use any language, or follow any other practice which his or her own religious beliefs may dictate", it would "violate the 'free exercise' clause of the Federal and State Constitutions, as well as the parent's rights * * * under the due process clause to control the education of his child."

The Justice at Special Term sustained the validity of the prayer and the power of the school board to direct it. He based his conclusion upon the theory that prayer in the schools is permissible "not as a means of teaching 'spiritual values' but because traditionally, and particularly at the time of the adoption of the First and Fourteenth Amendments, *this was the accepted practice.*" (Italics supplied.) (*Matter of Engel* v. *Vitale*, 18 Misc. 2d 659, 673, *supra.*) Apparently, therefore, the basis of his conclusion is that at the time of the amendments it was the accepted practice to utilize prayer in the public schools and, hence, it is proper to resort to prayer today.

While I agree with the final conclusion reached by the learned Justice at Special Term, I am in total dis-

agreement with his reasons therefor, and particularly with the "accepted practice" theory.

My sole reason for sustaining the "Regents' Prayer" is that, in my opinion, the prayer here involved *does not constitute religious teaching*. The recital of this prayer does nothing more than acknowledge the existence of God and dependence upon him. It gives no training or instruction of any religious nature whatever. There can be no constitutional objection to a prayer which is said without rites or ceremony or doctrinal teaching, and which serves at the beginning of each day to give each student who believes in God "a brief moment with eternity" and a feeling of "humility before the Supreme Power" (*Doremus* v. *Board of Educ.*, 5 N. J. 435, 452, appeal dismissed 342 U. S. 429). Such a prayer merely affirms and reaffirms "that this is a religious nation"; it recognizes (as do the Federal Constitution, every State Constitution and every colonial grant and charter beginning with the one to Christopher Columbus) "a profound reverence for religion and an assumption that its influence in all human affairs is essential to the well being of the community" (*Holy Trinity Church* v. *United States*, 143 U. S. 457, 468, 470).

I agree fully with the following statements made by the Supreme Court of New Jersey in the *Doremus* case (*supra*, pp. 439-440, 453):

"Was it the intent of the First Amendment that the existence of a Supreme Being should be negated and that the governmental recognition of God should be suppressed? Not that, surely * * *.

"Instances could be multiplied going to the undeniable result that the Constitution itself assumes as an unquestioned fact the existence and authority of God and that * * * all branches of the government followed a course of official conduct which openly accepts the existence of God as Creator and Ruler of the Universe * * *.

"The fact is that the First Amendment does not say, and so far as we are able to determine was not intended to say, that God shall not be acknowledged by our government as God. Our view is that a prohibition which is not in the language of the amendment and which is contrary to the intention of those who framed and adopted the instrument should not now be read into it."

While the authorities are in conflict, the general or prevailing rule, supported by the weight of authority, appears to be that the recitation of an undenominational prayer without comment (and particularly an informal prayer), is not prohibited by the constitutional provisions, either State or Federal, provided: (1) participation by the student in such recitation is not compulsory; (2) such recitation merely tends "to inculcate fundamental morality" in the students; and (3) it is not "carried so far as to emphasize the teaching of a particular sect" or of any particular religious doctrine (Ann. 141 A. L. R. 1144, 5 A. L. R. 866, 45 A. L. R. 2d 742; 47 Am. Jur., Schools, § 210, and cases there cited; *Lewis* v. *Board of Educ. of City of N. Y.*, 157 Misc. 520, 528-530, mod. on other grounds 247 App. Div. 106, appeal dismissed 276 N. Y. 496; *Doremus* v. *Board of Educ.*, 5 N. J. 435, appeal dismissed 342 U. S. 429, *supra*; contra: *Schempp* v. *School Dist. of Abington Township*, 177 F. Supp. 398, 404-407).

In my opinion, the prayer here is not said pursuant to any law or order "respecting an establishment of religion" (U. S. Const., 1st Amdt.). It is said pursuant to an order which authorizes, as prescribed by both the State and Federal Constitutions, the "free exercise" and enjoyment of religious profession and worship, without discrimination or preference. As to those who believe in God, the prayer constitutes simply a "pledge of allegiance" to Him and an invocation of His divine blessing. In other words, it is a voluntary confesion of faith in the exercise of the religious freedom guaranteed to every individual by the State and Federal Constitutions. Accordingly, it

does not partake in the slightest degree of religious training or religious teaching.

In a recent case (*Matter of Lewis* v. *Allen*, 5 Misc. 2d 68, 73, *supra*) in which an attack was made upon the inclusion of the words "under God" in the pledge of allegiance to the flag, Mr. Justice Bookstein at Special Term, Albany County, made these statements, which are quite apropos: "If petitioners' contention be sound, it may be wondered whether the public school curriculum might properly include the Declaration of Independence and the Gettysburg Address. Could 'America' ('Protect us by thy might, Great God, our King!') be sung in a public school without offending the First Amendment? And might not the presidential oath of office have questionable constitutional status?"

The contention that acknowledgments of and references to Almighty God are acceptable and desirable in all other phases of our public life but not *in our public schools* is, in my judgment, an attempt to stretch far beyond its breaking point the principle of separation of church and State and to obscure one's vision to the universally accepted tradition that ours is a Nation founded and nurtured upon belief in God.

In the most recent pronouncement by the United States Supreme Court which dealt with the "released time" program in our public schools (*Zorach* v. *Clauson*, 343 U. S. 306), the court gave to the Nation these basic principles for its guidance (pp. 312-314):

"There is much talk of the separation of Church and State in the history of the Bill of Rights and in the decisions clustering around the First Amendment. See *Everson* v. *Board of Education*, 330 U. S. 1; *McCollum* v. *Board of Education*, *supra*. There cannot be the slightest doubt that the First Amendment reflects the philosophy that Church and State should be separated. And * * * the separation must be complete and unequivocal. The First Amendment within the scope of its coverage permits no

exception; the prohibition is absolute. *The First Amendment, however, does not say that in every and all respects there shall be a separation of Church and State.* Rather, it studiously defines the manner, the specific ways, in which there shall be no concert or union or dependency one on the other. That is the common sense of the matter. Otherwise the state and religion would be aliens to each other—hostile, suspicious, and even unfriendly. * * * Prayers in our legislative halls; the appeals to the Almighty in the messages of the Chief Executive; the proclamations making Thanksgiving Day a holiday; 'so help me God' in our courtroom oaths—these and all other references to the Almighty that run through our laws, our public rituals, our ceremonies would be flouting the First Amendment. A fastidious atheist or agnostic could even object to the supplication with which the Court opens each session: 'God save the United States and this Honorable Court.' (Italics supplied.) * * *

"We are a religious people whose institutions presuppose a Supreme Being. We guarantee the freedom to worship as one chooses. We make room for as wide a variety of beliefs and creeds as the spiritual needs of man deem necessary. We sponsor an attitude on the part of government that shows no partiality to any one group and that lets each flourish according to the zeal of its adherents and the appeal of its dogma. When the state encourages religious instruction or cooperates with religious authorities by adjusting the schedule of public events to sectarian needs, it follows the best of our traditions. For it then respects the religious nature of our people and accommodates the public service to their spiritual needs. To hold that it may not would be to find in the Constitution a requirement that the government show a callous indifference to religious groups. That would be preferring those who believe in no religion over those who do believe. Government may not finance religious groups nor undertake religious instruction nor blend secular and sectarian educa-

tion nor use secular institutions to force on, or some religion on any person. But we find no constitutional requirement which makes it necessary for government to be hostile to religion and to throw its weight against efforts to widen the effective scope of religious influence. The government must be neutral when it comes to competition between sects. It may not thrust any sect on any person. It may not make a religious observance compulsory. It may not coerce anyone to attend church, to observe a religious holiday, or to take religious instruction. But it can close its doors or suspend its operations as to those who want to repair to their religious sanctuary for worship or instruction. No more than that is undertaken here."

The prayer here under attack is indeed a part of man's immemorial, inseparable and absolute right to declare his faith and to acknowledge and place his trust in God. The constitutional provisions are intended to protect and to perpetuate this right in man and never to deprive him of it or to discriminate against it. And, in furtherance of such protection, the State must scrupulously observe a strict neutrality; it may not favor or disfavor the believer over the nonbeliever or one sect over another (cf. *Everson* v. *Board of Educ.*, 330 U. S. 1, 18, 64; *Matter of Zorach* v. *Clauson*, 303 N. Y. 161, 170, 180-183, affd. 343 U. S. 306, 311-315, *supra*).

Of course, the "man of no religion has a right to act in accordance with his lack of religion" but he has "no right to insist that others shall have no religion" (*Reichwald* v. *Catholic Bishop of Chicago*, 258 Ill. 44, 48), particularly since, as stated, from the very inception of this country we have been essentially "a religious people whose institutions presuppose a Supreme Being" (*Zorach* v. *Clauson*, 343 U. S. 306, 313, *supra*; cf. *Holy Trinity Church* v. *United States*, 143 U. S. 457, 465-470, *supra*). The right to disbelieve as well as to believe is guaranteed by the First Amendment, and the disbeliever may therefore refrain from engaging in prayer. But the amendment affords the dis-

believer "no preference over those who do believe in God and who * * * choose to express that belief" (*Matter of Lewis* v. *Allen*, 5 Misc. 2d 68, 75, *supra*).

As pointed out by Judge DESMOND in his concurring opinion in the *Zorach* case (*supra*, pp. 181-183), it "is inconceivable" that the First Amendment to the Federal Constitution "was ever meant to prohibit governmental encouragement of, or cooperation with, religions generally" because "ours is a religious nation" and because such aid and encouragement, "as distinguished from establishment or support of separate sects, has never been considered offensive to the American constitutional system."

Here, when the local school board authorizes the prayer to be said at the opening of the school day by all those *desiring* to participate, it does no more than to postpone the period of the secular instruction for the minute or less required for the prayer or acknowledgment of religious faith. In my opinion such an accommodation of the secular education to the voluntary prayer or confession of religious faith directed by this local Board of Education, is not religious teaching or religious instruction. It is a proper and commendable practice which is in keeping with the best traditions of this Country and with the relevant provisions of the State and Federal Constitutions (cf. *Matter of Zorach* v *Clauson*, 303 N. Y. 161, 170, 180-183, *supra*; *Zorach* v. *Clauson*, 343 U. S. 306, 311-315, *supra*; *Matter of Lewis* v. *Allen*, 5 Misc. 2d 68, *supra*; *64th St. Residences* v. *City of New York*, 10 Misc. 2d 841, 845-847; *Baer* v. *Kolmorgen*, 14 Misc. 2d 955, 957; *Baer* v. *Kolmorgen*, 14 Misc. 2d 1015, 1016-1017, 1021-1022).

I now come to the contention as to the compulsory nature of the prayer. It is claimed that subtle pressure is created by reason of the necessity for the parent and the child to request that the child be excused from participation, and that such pressure *compels* participation in the prayer. In remanding the matter to the Board of Education, the Justice at Special Term has left the procedure to be adopted entirely to the board's wisdom.

However, the said Justice in his opinion expressed his own views as to some of the methods to be employed to eliminate the elements of coercion and "subtle" pressure. In doing so he has recommended, among other things: (1) that the child to be excused may arrive "later" or appear in class after the recital of the prayer; (2) that the prayer may be said in "common assembly" and the excused child sent to another room; and (3) that there shall be no comment made with respect to the excused child or any requirement imposed on him as to his posture or attire (similar to the practice adopted by the New York City Board of Education in its operation of the released time program).

I fully agree with the last recommendation with respect to the omission of any comment and of any requirement as to posture and attire. I disagree, however, with respect to the other stated recommendations.

It is my opinion that the choice of action to be followed should not be left to the Board of Education to be *mandated* upon the parent; but that the *free choice* of the *alternative procedures* should be *left to the parent* pursuant to a formula to be adopted by the board after thorough discussion and consultation with all interested groups.

I disapprove of the recommendation that the prayer be said in common assembly and the excused child be sent to another room. In such proposed practice I see a potential pressure which, as to some students, may rise to the level of compulsion or coercion, and which as to many students may result in a schism and divisiveness.

I likewise disapprove of the recommendation that the excused child may report "late". I believe that the basic discipline of any school requires a uniform time of commencement for all students in the same grades or classes.

My own preference is that the prayer be one not mandated and required to be repeated or recited verbatim by all in attendance in the room, pursuant to the order of

the school board. I would suggest that the recitation of the prayer be put on a voluntary basis and that it be conducted in a manner similar to that of an invocation or benediction by a priest, minister, rabbi, or layman at public or private functions attended by men of all faiths, namely: that the prayer be recited by the teacher or by a student designated by the teacher; that the other students in the class be invited (not directed) to join in the prayer if they so desire by repeating it aloud or *sotto voce* or by silent meditations, and that all those present who elect not to join may refrain from participating and remain quiet. In other words, even though those present in the classroom may include all the unexcused students only, nevertheless there should be no requirement for the students to repeat the prayer *aloud*. Each student should be free to do so or to remain silent, according to his own conscience and his parental instruction.

It may well be that, despite all the practicable safeguards taken, some vestige of compulsion due to embarrassment may still remain, because when one abstains "it sets him apart as a dissenter, which is humiliating" (*McCollum* v. *Board of Educ.*, 333 U. S. 203, 232). Such embarrassment, however, is the inevitable consequence of dissent; it is the price which every nonconformist must pay. But, as pointed out by Mr. Justice JACKSON in the *McCollum* case (p. 233): "Even admitting this to be true, it may be doubted whether the Constitution which, of course, protects the right to dissent, can be construed also to protect one from the embarrassment that always attends nonconformity, whether in religion, politics, behavior or dress. Since no legal compulsion is applied to * * * [the dissenting student] and no penalty is imposed or threatened from which we may relieve him, we can hardly base jurisdiction [to intervene and stop the practice] on this ground."

In conclusion, it is suggested that in the formulation of its procedures on the remand, the school board may well use as a guide the classic statement made in 1839 by the then New York State Superintendent of Schools, Mr. Spencer. He said: "'Both parties have rights; the one to bring up their children in the practice of publicly thanking their Creator for His protection, and invoking His blessing; the other of declining in behalf of their children, the religious services of any person in whose creed they may not concur, or for other reasons satisfactory to themselves. These rights are reciprocal, and should be protected equally; and neither should interfere with the other. Those who desire that their children should engage in public prayer have no right to compel other children to unite in the exercise, against the wishes of their parents. Nor have those who object to this time, place or manner of praying, or to the person who conducts the exercises, a right to deprive the other class of the opportunity of habituating their children to what they conceive an imperious duty. Neither the common school system, nor any other social system, can be maintained, unless the conscientious views of all are equally respected. The simple rule, so to exercise your own rights as not to infringe on those of others, will preserve equal justice among all, promote harmony, and insure success to our schools.'" (*Matter of Engel* v. *Vitale*, 18 Misc. 2d 659, 661-662, *supra*.)

This statement of Superintendent Spencer is as valid today as it was when made. It summarizes, perhaps better than elsewhere, the respective legal rights of the believer and the non-believer and the best means of preserving such rights in relation to prayer in the classroom.

It is my opinion that the "Regents' Prayer" may be validly integrated into the curricula of the public schools, provided that participation in such daily prayer is made optional with each student in accordance with the safeguards here suggested.

NOLAN, P. J., CHRIST, PETTE and BRENNAN, JJ., concur in *Per Curiam* opinion; BELDOCK, J., concurs in part and dissents in part, in opinion.

Order insofar as appealed from affirmed, without costs, upon the opinion of the Special Term.

OPINION OF THE COURT OF APPEALS

Chief Judge DESMOND. In 1951 and again in 1955 the Board of Regents, governing body of our State public school system, recommended to all local school boards that "at the commencement of each school day the act of allegiance to the Flag might well be joined with this act of reverence to God: 'Almighty God, we acknowledge our dependence upon Thee, and we beg Thy blessings upon us, our parents, our teachers and our Country'." In 1958 the respondents, who are the board members of a public school district in Nassau County, conformed to the Regents' recommendation and gave instructions to the teaching staff to adopt the practice in the district's schools. Petitioners, taxpayers in the district and parents of children attending the schools and all (except one "non-believer") being members of various religious bodies, brought this proceeding for an order directing the board to discontinue the practice. They assert that it is unlawful because of the prohibitions of the First Amendment ("no law respecting an establishment of religion, or prohibiting the free exercise thereof") and the command of section 3 of article I of our State Constitution ("The free exercise and enjoyment of religious profession and worship, without discrimination or preference, shall forever be allowed in this state to all mankind").

The order here appealed from contains adequate provisions to insure that no pupil need take part in or be present during the act of reverence, so any question of "compulsion" or "free exercise" is out of the case (see *Zorach* v. *Clauson*, 343 U. S. 306).

What remains of appellants' argument is this: that the saying of the "Regents prayer" as a daily school exercise is a form of State-sponsored religious education and is accordingly an unconstitutional "establishment of religion". If the utterance of these reverential words was "religious education", then providing such education would be so far beyond the powers of a public school board as to be wholly arbitrary and unlawful, so that the courts would need no constitutional warrant for forbidding it. But it is not "religious education" nor is it the practice of or establishment of religion in any reasonable meaning of those phrases. Saying this simple prayer may be, according to the broadest possible dictionary definition, an act of "religion", but when the Founding Fathers prohibited an "establishment of religion" they were referring to official adoption of, or favor to, one or more sects. They could not have meant to prohibit mere professions of belief in God for, if that were so, they themselves in many ways were violating their rule when and after they adopted it. Not only is this prayer not a violation of the First Amendment (no decision of this or of the United States Supreme Court says or suggests that it is) but a holding that it is such a violation would be in defiance of all American history, and such a holding would destroy a part of the essential foundation of the American governmental structure.

The "Regents prayer" is an acknowledgment of our dependence upon Almighty God and a petition for the bestowal of His blessings. It includes an acknowledgment of the existence of a Supreme Being just as does the Declaration of Independence and the Constitutions of each of the 50 States of the Union, including our own. In construing even a Constitution some attention must be paid to the obvious intent of those who drafted it and adopted it (*Matter of Carey* v. *Morton*, 297 N. Y. 361). That the First Amendment was ever intended to forbid as an "establishment of religion" a simple declaration of belief in God is so contrary to history as to be impossible of

acceptance. No historical fact is so easy to prove by literally countless illustrations as the fact that belief and trust in a Supreme Being was from the beginning and has been continuously part of the very essence of the American plan of government and society. The references to the Deity in the Declaration of Independence; the words of our National Anthem: "In God is our trust"; the motto on our coins; the daily prayers in Congress; the universal practice in official oaths of calling upon God to witness the truth; the official thanksgiving proclamations beginning with those of the Continental Congress and the First Congress of the United States and continuing till the present; the provisions for chaplaincies in the armed forces; the directions by Congress in modern times for a National Day of Prayer and for the insertion of the words "under God" in the Pledge of Allegiance to the Flag; innumerable solemn utterances by our Presidents and other leaders—all these and many more make historically unescapable the flat statement in *Zorach* v. *Clauson* (343 U. S. 306, 313, *supra* [1952]) that: "We are a religious people whose institutions presuppose a Supreme Being", which paraphrased the Supreme Court's similar assertion in 1892 in the *Holy Trinity Church* case (*Holy Trinity Church* v. *United States*, 143 U. S. 457). As Justice Beldock of the Appellate Division wrote in this case: "The contention that acknowledgements of and references to Almighty God are acceptable and desirable in all other phases of our public life but not *in our public schools* is, in my judgment, an attempt to stretch far beyond its breaking point the principle of separation of church and State and to obscure one's vision to the universally accepted tradition that ours is a Nation founded and nurtured by belief in God."

The "universally accepted tradition" referred to by Justice Beldock has been maintained without break from the days of the Founding Fathers, all of whom believed in the existence of God (see Cousins, In God We Trust),

to the day of the inauguration of President Kennedy. It is an indisputable and historically provable fact that belief and trust in a Creator has always been regarded as an integral and inseparable part of the fabric of our fundamental institutions. It is not a matter of majority power or minority protection. Belief in a Supreme Being is as essential and permanent a feature of the American governmental system as is freedom of worship, equality under the law and due process of law. Like them it is an American absolute, an application of the natural law beliefs on which the Republic was founded and which in turn presupposes an Omnipotent Being.

The motives and purposes of the Regents and of the local board are noble. The success of the practice is problematical. But there is no problem of constitutionality.

The order should be affirmed, without costs.

FROESSEL, J. (concurring). The thoughtful and thorough opinion written at Special Term and its review of the relevant history and the authorities, culminating in its order of March 17, 1961, renders extended discussion unnecessary.

We are not here concerned with the statements of the Board of Regents or of the local school board as to their motives or purposes in the eventual promulgation of the challenged recitation.

The narrow question presented is: Do the Federal and State Constitutions prohibit the recitation by children in our public schools of the 22 words acknowledging dependence upon Almighty God, and invoking His blessing upon them, their parents and teachers, and upon our country? To say that they do seems to me to stretch the so-called separation of church and State doctrine beyond reason.

History and common experience teach us that the perception of a Supreme Being, commonly called God, is

experienced in the lives of most human beings. Some, it is true, escape it, or think they do for a time. In any event, that perception is manifest, independent of any particular religion or church, and has become the foundation of virtually every recognized religious faith—indeed, the common denominator. One may earnestly believe in God, without being attached to any particular religion or church. Hence a rule permitting public school children, willing to do so, to acknowledge their dependence upon Him, and to invoke His blessings, can hardly be called a "law respecting an establishment of religion" or "prohibiting the free exercise thereof" in transgression of the First Amendment, which in nowise prohibits the recognition of God, or laws respecting such recognition.

The challenged recitation follows the pledge of allegiance, which itself refers to God. School children are permitted to sing "America", the fourth stanza of which is indeed a prayer, invoking the protection of "God", "Author of Liberty". The preamble to our State Constitution, which is taught in our public schools, provides: "We the People of the State of New York, grateful to Almighty God for our Freedom". Virtually every State Constitution in the United States, as well as the Declaration of Independence, contains similar references. To say that such references, and others of like nature employed in the executive, legislative and judicial branches of our Government (see *Zorach* v. *Clauson*, 343 U. S. 306, at pp. 312-313), unrelated to any particular religion or church, may be sanctioned by public officials everywhere but in the public school room defies understanding.

As Mr. Justice DOUGLAS said, in the *Zorach* case (*supra*, at p. 313), in holding that the New York City released time program does not violate the First Amendment, "We are a religious people whose institutions presuppose a Supreme Being. We guarantee the freedom to worship as one chooses. We make room for as wide a variety of beliefs or creeds as the spiritual needs of man deem necessary. We

sponsor an attitude on the part of government that shows no partiality to any one group and that lets each flourish according to the zeal of its adherents and the appeal of its dogma." Here no partiality is shown, nor are classrooms being turned over to religious instructors as in *McCollum v. Board of Educ.* (333 U. S. 203). Any effort of a particular group to promote its own beliefs, doctrines, tenets and dogma must be carried on outside the public school, and any law to the contrary would violate the First Amendment. (*McCollum v. Board of Educ., supra.*)

As we see it, then, the challenged recitation was rightly upheld. It is not compulsory, is clearly nonsectarian in language, and neither directly nor indirectly even suggests belief in any form of organized or established religion. It permits each child to express gratitude to God and to invoke His blessing, to be steadfast in the faith of his acceptance if he has one; it compels no one, directly or indirectly, to do anything, if that be his or his parents' wish. All remain free, and thus we do not show preference as between "those who believe in no religion" and "those who do believe" (*Zorach v. Clauson, supra*, p. 314).

The orders appealed from should be affirmed, without costs.

BURKE, J. (concurring). I concur in the opinions of Chief Judge DESMOND and Judge FROESSEL. The dissenting opinion not only inadvertently distorts the purposes of the First Amendment, but is also self-contradictory. The First Amendment, it admits, specifically forbids any kind of monism in respect to religion. The amendment, it concedes, encourages diverse religious tenets. But the opinion reads into the amendment *an attempt to compel conformity* in the field of education—in other words, a "compulsory unification of opinion" in all school boards to totally reject any religious element in education and banish it from the schools. This, of course, would force on the children a culture that is founded upon secularist dogma.

This interpretation rests on a misunderstanding. There is no language in the amendment which gives the slightest basis for the interpolation of a Marxist concept that mandates a prescribed ethic. According to the opinion, the separation of church and State which was intended to encourage *religious* interests among our people would become the constitutional basis for the *compulsory exclusion of any religious element* and the consequent promotion and advancement of atheism. It is not mere neutrality to prevent voluntary prayer to a Creator; it is an interference by the courts, contrary to the plain language of the Constitution, on the side of those who oppose religion.

DYE, J. (dissenting). The question posed on this appeal is whether the recital of a school-sponsored prayer may be required as a daily procedure in a public school. This question comes about as a result of a recommendation duly adopted at a special meeting of the Board of Education of Union Free School District Number Nine, New Hyde Park, New York, held July 8, 1958, requiring that "the regents prayer be said daily in our schools", pursuant to which the board gave a "direction to the District Principal that this be instituted as a daily procedure to follow the salute to the flag" (Minutes, Board of Educ., Union Free School, Dist. No. 9, of meeting July 8, 1958).

The Regents prayer is worded as follows: "Almighty God, we acknowledge our dependence upon Thee, and we beg Thy blessings upon us, our parents, our teachers and our Country." It derives from the "Regents Statement on Moral and Spiritual Training in the Schools", issued by the New York State Board of Regents, as duly adopted at a meeting held on November 30, 1951. This statement was reaffirmed and supplemented by "The Regents Recommendations for School Programs on America's Moral & Spiritual Heritage", unanimously adopted March 25, 1955. The recommendations requoted the opening sentence of the 1951 statement, viz.: "Belief in and dependence upon Almighty God was the very cornerstone upon which our

Founding Fathers builded", and went on to express the conviction that "such fundamental belief and dependence is the best security against the dangers of these difficult days and the adoption of their recommendations the best way of insuring that this Government and our way of life shall not perish from the earth".

The Regents recommended that school programs be instituted, stressing the moral and spiritual heritage of America. It was in response to this recommendation that the respondent board promulgated the above order.

In the schools in the respondents' district, it is the practice to say the prayer immediately after the salute to the flag, as a required daily procedure. It is led by the teacher or by a student selected by the teacher, with other students joining therein. While it does not appear whether any students leave the classroom during such recital, no penalty attaches for non-participation, since the board announced that, as a matter of policy, no child was to be required or encouraged to join in said prayer against his or her wishes.

The petitioners with one exception—a nonbeliever—are all members of various religious faiths and, as taxpayers and parents of children attending public schools within the district, have challenged the saying of the prayer and have demanded its discontinuance on the ground that it amounts to an abridgement of religious freedom guaranteed by the First and Fourteenth Amendments to the Federal Constitution and section 3 of article I and section 4 of article XI of the New York State Constitution which, in essence, is to say that it constitutes a breach in Jefferson's metaphorical wall "separating church and state".

No one doubts for a moment that we are a religious people. It can be safely said that under no other government —past or present—have the people enjoyed such an untrammeled freedom to worship as they please and to indulge such freedom in more different ways and according to more diverse tenets and beliefs than do the people of the United States. The number of sects and religious groups

are almost countless, due, no doubt, to the varied origins of our heterogeneous population who have come here seeking, among other things, an asylum from religious prosecution and a freedom to gain salvation in their own chosen way. The recognition of the need for the spiritual comfort and solace derived from religious practices was a first concern of the Founding Fathers who gave it expression in the simple and plainly worded phrase: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof". (U S., Const., 1st Amdt.) Our State Constitution reiterates the same thought as "The free exercise and enjoyment of religious profession and worship, without discrimination or preference, shall forever be allowed in this state to all mankind". (N. Y. Const. art. I, § 3.)

The natural consequence of these fundamental principles is not only to allow but to guarantee to all citizens an absolute freedom in the exercise of religious belief or no belief. By the same token, our State is free to function without interference by or dictation from an organized church. This mutual forbearance in spirit and in practice has eliminated divisiveness in a most sensitive area, created mutual respect for both church and State and has unified our people in a way that no other force could do.

The development of the precise meaning of the establishment and freedom clauses of the First Amendment has had a long and interesting history which needs no narration here. Very recently the United States Supreme Court has dealt with it in a series of historical decisions which, though varying in details, make it clear that the establishment and freedom clauses of the First Amendment constitute a complete and unequivocal separation of church and State, a wall which "must be kept high and impregnable", for in modern times it means at least this: "Neither a state for the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can

force nor influence a person to go to or remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or nonattendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and *vice versa*." (*Everson* v. *Board of Educ.*, 330 U. S. 1, 15-16.) A year later, in *McCollum* v. *Board of Educ.* (333 U. S. 203, 210), involving a released time program in Illinois public schools, the United States Supreme Court found that the program, which in substance permitted outside teachers sponsored by religious organizations to give instruction in religion to school children, in the school building, during the school hours, as a substitute for the secular teaching provided in accordance with the compulsory education law, was "beyond all question a utilization of the tax-established and tax-supported public school system to aid religious groups to spread their faith". This, as Mr. Justice BLACK took pains to point out (pp. 211-212), did not "manifest a government hostility to religion or religious teaching. A manifestation of such hostility would be at war with our national tradition as embodied in the First Amendment's guarantee of the free exercise of religion", and the key to its meaning "rests upon the premise that both religion and government can best work to achieve their lofty aims if each is left free from the other within its respective sphere". It is interesting to note that in *McCollum* the four dissenting Justices in *Everson* concurred. Mr. Justice FRANKFURTER, while recognizing (p. 213) the existence of a clash in views as to "what the wall separates", nonetheless made it very clear that the First and Fourteenth Amendments "have a secular reach far more penetrating

in the conduct of Government than merely to forbid an 'established church' ".

The New York released time program was tested and approved in *Zorach* v. *Clauson* (343 U. S. 306). This permitted release of public school students during class hours for religious instruction off the school grounds, provided that written parental approval was first obtained. All costs were paid by the interested religious organizations. Some have read *Zorach* as a retreat from *McCollum*, but a majority of the United States Supreme Court did not think so. In sustaining the program, the court removed any possible doubt that the principle of "complete and unequivocal" separation enunciated in *McCollum* was being reaffirmed since "the prohibition is absolute" (p. 312). As the court expressed it, "*We follow the McCollum case*" (p. 315; italics supplied). In deciding the merits as they did, the United States Supreme Court took the view that New York was "adjusting the schedule of public events to sectarian needs * * * [in the] best of our traditions", for to hold otherwise, in its opinion, "would be to find in the Constitution a requirement that the government show a callous indifference to religious groups. * * * The government must be neutral when it comes to competition between sects. It may not thrust any sect on any person. It may not make a religious observance compulsory. It may not coerce anyone to attend church, to observe a religious holiday, or to take religious instruction. But it can close its doors or suspend its operations as to those who want to repair to their religious sanctuary for worship or instruction. No more than that is undertaken here" (p. 314).

It is also interesting to note that in *McGowan* v. *Maryland* (366 U. S. 420), Mr. Justice Douglas took occasion to sharpen what he had previously said in *Zorach* about our being a "religious people" by writing:

"But those who fashioned the Constitution decided that if and when God is to be served, His service will not be motivated by coercive measures of government. * * * [The

First Amendment] means, as I understand it, that if a religious leaven is to be worked into the affairs of our people, it is to be done by individuals and groups, not by the Government. * * * The idea, as I understand it, was to limit the power of government to act in religious matters (*Board of Education* v. *Barnette*, *supra*; *McCollum* v. *Board of Education*, 333 U. S. 203), not to limit the freedom of religious men to act religiously nor to restrict the freedom of atheists or agnostics.

"The First Amendment commands government to have no interest in theology or ritual; * * * On matters of this kind government must be neutral." (*McGowan* v. *Maryland*, 366 U. S. 420, 3-564, *supra*.)

Very recently *McCollum* (*supra*), was employed to strike down Maryland's "belief in God" test for public office as an unconstitutional invasion of "freedom of belief and religion" and, accordingly, unenforcible (*Torcaso* v. *Watkins*, 367 U. S. 488, 495), the Supreme Court stating: "Neither [a State nor the Federal Government] can constitutionally pass laws or impose requirements which aid all religions as against non-believers, and neither can aid those religions based on a belief in the existence of God as against those religions founded on different beliefs." It is clear, therefore, that the "establishment" clause should not have the narrow application which a majority here would ascribe to it, and that it bars the action taken by the school board.

Running through the fabric of these definitive decisions, like the pattern of a tree of life in an intricate tapestry, is a clearly defined line of demarcation between church and State, which may not be overstepped in the slightest degree in favor of either the church or the State. In such light, a board of education may not require the saying of the Regents prayer as a daily school procedure. It is a form of State-sponsored religious education; in fact, according to the Regents, its purpose is "teaching our children, as set forth in the Declaration of Independence, that Almighty

God is their Creator" (1951 Statement of Belief) and "will give to the student an understanding and appreciation of his role as an individual endowed by his Creator * * * and of reverence for Almighty God." It would thus "fulfill its [the school's] high function of supplementing the training of the home" (Fundamental Beliefs, Regents Recommendations, adopted March 25, 1955). This requirement falls squarely within the categories of disability accounting for the decisions in *Everson* and *McCollum* (*supra*): use of public school classrooms during regular school hours, limitation of participation to those children whose parents consent and, in addition, being led by a teacher or by a person designated by the teacher. Under such announced purpose and method of performance, it cannot be less than instruction contrary to the establishment and freedom clauses, nor can the requirement be excused on the theory that the saying of the prayer—although conducted in the presence of the student body in the assembly hall of the classroom—is nonetheless a voluntary act, since no child is "required or encouraged to join in said prayer against his or her wishes" (Answering Affidavit), or on the theory that during the saying the child may remain silent, leave the room or report late. This is no answer, for it contains the very elements the prayer is supposed to eliminate: divisiveness, a type of compulsion, exerting as it does a pressure which an immature child is unable to resist because of his inherent desire to conform, and constituting a subtle interference by the State with the religious freedom guaranteed by the First Amendment. As Mr. Justice FRANKFURTER so aptly phrased it: "Separation means separation, not something less * * *. The public school is at once the symbol of our democracy and the most pervasive means for promoting our common destiny. In no activity of the State is it more vital to keep out divisive forces than in its schools, to avoid confusing, not

to say fusing, what the Constitution sought to keep strictly apart." (*McCollum, supra*, p. 231.)

The mere circumstance that the children of these petitioners may constitute a minority is no justification for rejecting their petition. The guarantees of the Bill of Rights, of which the First Amendment is the very cornerstone, were designed to protect minorities, which include diverse religious sects and atheists. While majority rule is an accepted incident of the political aspects of the democratic process, nothing in the Bill of Rights permits imposing the will of a majority—even in the slightest degree—upon an objecting minority, contrary to its protective cloak (*Torcaso* v. *Watkins, supra*; *Board of Educ.* v. *Barnette*, 319 U. S. 624). The very fact that the school board is charged with the duty of educating the young who are compelled to attend public school, except in certain instances not presently pertinent (Education Law, § 3212), is reason enough to observe scrupulously the establishment and freedom clauses here invoked. What was said in *McCollum* is appropriate here: "We renew our conviction that 'we have staked the very existence of our country on the faith that complete separation between the state and religion is best for the state and best for religion.' *Everson* v. *Board of Education*, 330 U. S. at 59. If nowhere else, in the relation between Church and State, 'good fences make good neighbors.'" (*McCollum, supra*, p. 232.)

The sponsors of the Regents prayer claim that it is nonsectarian in nature, a simple statement acknowledging the existence of and our dependence upon a Supreme Being; that such reference is of much the same character as the reference to God in various holiday programs (i.e., Christmas, Easter, Thanksgiving Day), in various official oaths, in invocations and benedictions said at most public gatherings, at meetings of some official bodies as well as in the inscription of the motto "In God We Trust" on coins, stamps and bank notes. Although these references may well be regarded as a permissible illustration that we are a

religious people (cf. *Zorach* v. *Clauson, supra*), it does not follow that the Regents prayer is beyond the reach of the First Amendment. Such an approach belies the avowed purpose of the Regents which, as we have pointed out, was to commence "teaching our children" (Statement of Belief). In our view, this conflicts with the establishment clause which, under the Fourteenth Amendment, applies to the State—and Boards of Education are not excepted (*Board of Educ.* v. *Barnette, supra*). While the *Barnette* case dealt with the punitive consequences of noncompliance, the United States Supreme Court again made it clear that "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein" (p. 642). The pledge of allegiance was neither designed nor intended for other than a patriotic purpose; yet, as applied to children who were expelled for refusal to comply because of religious scruples and whose absence thereby became unlawful, subjecting them and their parents or guardians to punishment was held unenforcible as to them. Under the Federal Constitution, it employed an impermissible means of achieving "national unity". "Compulsory unification of opinion", as Mr. Justice JACKSON in his illimitable forthrightness said (p. 641), "achieves only the unanimity of the graveyard." The inculcation of religion is a matter for the family and the church. In sponsoring a religious program, the State enters a field which it has been thought best to leave to the church alone. However salutary the underlying purpose of the requirement may be, it nonetheless gives to the State a direct supervision and influence that overstep the line marking the division between church and State and cannot help but lead to a gradual erosion of the mighty bulwark erected by the First Amendment. This does not mean that the State is or should be hostile to religion—merely that the State should not invade an area where the constitutionally protected

freedom is absolute and not open to the vicissitudes of legislative or judicial balancing.

The order appealed from should be reversed and the prayer of the petitioners should be granted, directing the Board of Education of Union Free School District Number Nine, New Hyde Park, to discontinue the saying of the Regents prayer in the schools within its district.

Judge FOSTER concurs with Chief Judge DESMOND; Judge FROESSEL concurs in an opinion in which Judge VAN VOORHIS concurs; Judge BURKE concurs in a separate opinion; Judge DYE dissents and votes to reverse in an opinion in which Judge FULD concurs

Order affirmed.

APPENDIX B

No. 456

COURT OF APPEALS

STATE OF NEW YORK, ss.:

PLEAS in the Court of Appeals, held at Court of Appeals Hall, in the City of Albany, on the 7th day of July in the year of our Lord one thousand nine hundred and sixty-one, before the Judges of said Court.

Witness,

The HON. CHARLES S. DESMOND,
Chief Judge Presiding.

RAYMOND J. CANNON,
Clerk.

Remittitur July 7, 1961.

No. 456

In the Matter of

the Application of STEVEN I. ENGEL, & ORS.,
Appellants,

vs.

WILLIAM J. VITALE, JR., & ORS., constituting the Board of Education of Union Free School District Number Nine, New Hyde Park, New York,

Respondents,

directing them to discontinue a certain school practice,

and

HENRY HOLLENBERG, & ORS.,
Intervenors-Respondents.

BE IT REMEMBERED, That on the 24th day of December in the year of our Lord one thousand nine hundred and

sixty, Steven I. Engel, & ors., the appellants in this cause, came here unto the Court of Appeals, by Butler, Jablow & Geller, their attorneys, and filed in the said Court a Notice of Appeal and return thereto, from the order of the Supreme Court, Nassau County. And William J. Vitale, Jr., & ors, constituting the Board of Education of Union Free School District Number Nine, New Hyde Park, New York, the respondents, and Henry Hollenberg, & ors, the intervenors-respondents in said cause, afterwards appeared in said Court of Appeals by Gunn, Neier & Daliker, and Hahn, Hahn, Ford, their respective attorneys.

Which said Notice of Appeal and the return thereto, filed as aforesaid, are hereunto annexed.

Whereupon, The said Court of Appeals having heard this cause argued by Mr. William J. Butler, of counsel for the appellants, and by Mr. Bertram B. Daiker, of counsel for the respondents, and by Mr. Porter R. Chandler, of counsel for the intervenors-respondents, briefs filed by amici curiae, and after due deliberation had thereon, did order and adjudge that the order appealed from herein be and the same hereby is affirmed, without costs.

And it was also further ordered, that the records aforesaid, and the proceedings in this Court, be remitted to the Supreme Court of the State of New York, there to be proceeded upon according to law.

Therefore, it is considered that the said order be affirmed, without costs, as aforesaid.

And hereupon, as well the Notice of Appeal and return thereto aforesaid as the judgment of the Court of Appeals aforesaid, by it given in the premises, are by the said Court of Appeals remitted into the Supreme Court of the State of New York before the Justices thereof, according to the form of the statute in such case made and provided, to be enforced according to law, and which record

now remains in the said Supreme Court, before the Justices thereof, &c.

RAYMOND J. CANNON,
Clerk of the Court of Appeals of the
State of New York.

Court of Appeals, Clerk's Office, Albany, July 7, 1961. } ss.:

I HEREBY CERTIFY, that the preceding record contains a correct transcript of the proceedings in said cause in the Court of Appeals, with the papers originally filed therein, attached thereto.

RAYMOND J. CANNON,
Clerk.

(SEAL)

Office-Supreme Court, U.S.
FILED
NOV 14 1961
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

October Term, 1961
No. 468

In the Matter of the Application
of
STEVEN I. ENGEL, DANIEL LICHTENSTEIN, MONROE LERNER, LENORE LYONS and LAWRENCE ROTH,

Petitioners,

against

WILLIAM J. VITALE, JR., PHILIP J. FREED, MARY HARTE, ANNE BIRCH and RICHARD SAUNDERS, constituting the Board of Education of Union Free School District No. 9, New Hyde Park, New York,

Respondents,

directing them to discontinue a certain school practice,

and

HENRY HOLLENBERG, ROSE LEVINE, MARTIN ABRAMS, HELEN SWANSON, WALTER F. GIBB, JANE EHLEN, RALPH B. WEBB, VIRGINIA ZIMMERMAN, VIRGINIA DAVIS, VIOLET S. COX, EVELYN KOSTER, IRENE O'ROURKE, ROSEMARY PETTELENZ, DANIEL J. REEHIL, THOMAS DELANEY and EDWARD L. MacFARLANE,

Intervenors-Respondents.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

MOTION FOR LEAVE TO SUBMIT A BRIEF *AMICUS CURIAE*

BRIEF OF THE BOARD OF REGENTS OF THE UNIVERSITY OF THE STATE OF NEW YORK AS *AMICUS CURIAE*

CHARLES A. BRIND,
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Of Counsel.
JOHN P. JEHU,
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LOUIS H. J. WELCH.

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Intervenors-Respondents.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

MOTION FOR LEAVE TO SUBMIT A BRIEF *AMICUS CURIAE*

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The Board of Regents of the University of the State of New York respectfully move this Court for leave to file the accompanying brief in this case as *amicus curiae.* Un-

der Rule 42, subd. 4 of the Revised Rules of this Court, consent to the filing of a brief of an *amicus curiae* need not be had when the brief is presented for an agency of a State sponsored by the authorized law officer thereof. The Board of Regents of the University of the State of New York is a lawfully authorized body, the head of the University of the State of New York and of the State Education Department, pursuant to New York State Constitution, Article V, Section 4, Article XI, Section 2, and Education Law, Sections 101 and 201, and Charles A. Brind, Esq., is the Counsel to the said Board of Regents of the University of the State of New York and of the New York State Education Department and as such is its authorized legal officer; he is a member of the Bar of this Court.

The Board of Regents of the University of the State of New York, the moving party, has an interest in this case in that it is charged by law with the general management and supervision of all public schools and all of the educational work of the State of New York, exercises legislative functions concerning the educational system of the State, determines its educational policies and establishes rules for carrying into effect the laws and policies of the State relating to education, pursuant to New York State Education Law, Sections 101 and 207.

In the exercise of its duties and functions, the said Board of Regents, on November 30, 1951, adopted a Statement of Belief on Moral and Spiritual Training in the Schools and, on March 25, 1955, adopted Recommendations for School Programs of America's Moral and Spiritual Heritage. The earlier of these two statements contained a recommendation to the school districts of New York State that the so-called "Regents Prayer", the use of which is the subject

matter of the cause at bar, be used daily in conjunction with the Pledge of Allegiance.

Respondent-Respondent Board of Education has followed the said Recommendation of the Board of Regents, *Amicus Curiae*, in relation to the prayer contained in such Statements, and has instructed its staff to have the same used daily, as recommended, in conjunction with the Pledge of Allegiance, and the same has been so used since September 1958, except for certain changes which we understand the Board of Education made in its procedures in compliance with Mr. Justice Meyer's order in the Supreme Court of New York State, Nassau County, Special Term, which was affirmed by the Appellate Division, Second Judicial Department and the Court of Appeals of the State of New York.

The Board of Regents, accordingly, is deeply interested in the litigation here involved and strongly supports the decisions of the Courts below which upheld the constitutionality of the prayer recommended by *Amicus Curiae*.

It is respectfully urged that the accompanying brief *amicus curiae* be accepted by this Court.

Dated: November 1, 1961.

Respectfully submitted,

CHARLES A. BRIND, JR.,
Counsel for Board of Regents of the University of the State of New York, Amicus Curiae,
State Education Building,
Albany, New York.

BRIEF OF *AMICUS CURIAE*

The Board of Regents of the University of the State of New York respectfully submits this brief as *amicus curiae* in support of the respondent.

This brief confines itself to the question of the constitutionality of the use of the prayer recommended by *Amicus Curiae* in the public schools of the State of New York.

Statement of the Case

Respondent Board of Education had determined to follow the recommendation of *Amicus Curiae* and had instructed its staff to use the so-called "Regents Prayer" (see Appendix A, attached hereto) daily in conjunction with the Pledge of Allegiance to the Flag.

Thereupon the present proceeding was instituted by petitioners herein, claiming that the said use of the said prayer was in violation of the United States Constitution and asking the Court to direct respondent Board of Education to discontinue the use thereof.

The petition herein was dismissed by the Nassau County Supreme Court, Special Term, upon a lengthy opinion of Mr. Justice MEYER (18 Misc. 2d 659). This order was affirmed by the Appellate Division of the New York State Supreme Court, Second Judicial Department (11 A. D. 2d 340). The Court of Appeals of the State of New York affirmed the order of the Appellate Division (10 N. Y. 2d 174).

The case is before this Court on a Writ of Certiorari to the New York Court of Appeals.

U. S. Code, Title 36, Chap. 10, Sec. 172

172. Pledge of Allegiance.—The following is designated as the pledge of allegiance to the flag: "I pledge allegiance to the flag of the United States of America and to the Republic for which it stands, one Nation under God, indivisible, with liberty and justice for all." Such pledge should be rendered by standing with the right hand over the heart. However, civilians will always show full respect to the flag when the pledge is given by merely standing at attention, men removing the headdress. Persons in uniform shall render the military salute.

New York State Constitution

Article V, Section 4. [Department heads.]

The head of the executive department shall be the governor. The head of the department of audit and control shall be the comptroller and of the department of law, the attorney general. *The head of the department of education shall be The Regents of the University of the State of New York, who shall appoint and at pleasure remove a commissioner of education to be the chief administrative officer of the department.* The head of the department of agriculture and markets shall be appointed in a manner to be prescribed by law. Except as otherwise provided in this constitution, the heads of all other departments and the members of all boards and commissions, excepting temporary commissions for special purposes, shall be appointed by the governor by and with the advice and consent of the senate and may be removed by the governor, in a manner to be prescribed by law. (Emphasis supplied.)

Article XI, Section 2. [Regents of the University.]

The corporation created in the year one thousand seven hundred eighty-four, under the name of The Regents of the University of the State of New York, is hereby continued under the name of The University of the State of New York. It shall be governed and its corporate powers, which may be increased, modified or diminished by the legislature, shall be exercised by not less than nine regents.

New York State Education Law

Section 101. Education department; regents of the university.

There shall continue to be in the state government an education department. The department is charged with the general management and supervision of all public schools and all of the educational work of the state, including the operations of The University of the State of New York and the exercise of all the functions of the education department, of The University of the State of New York, of the regents of the university and of the commissioner of education and the performance of all their powers and duties, which were transferred to the education department by section three hundred twelve of the state departments law or shall have been prescribed by law before March sixteenth, nineteen hundred twenty-seven, whether in terms vested in such department or university or in any sub-department, division or bureau thereof or in such commissioner, board or officer, and such functions, powers and duties shall continue to be vested in the education department continued by this chapter and shall continue to be exercised and performed therein by or through the appropriate officer, sub-department, division or bureau thereof,

together with such functions, powers and duties as hereafter may be conferred or imposed upon such department by law. All the provisions of this chapter, in so far as they are not inconsistent with the provisions of this chapter, as hereby amended or may be made applicable, shall apply to the education department continued by this chapter as hereby amended and to The University of the State of New York, the board of regents of the university, the commissioner of education and to the divisions, bureaus and officers in such department. The head of the department shall continue to be the regents of The University of the State of New York, who shall appoint, and at pleasure may remove, the commissioner of education. The commissioner shall continue to be the chief administrative officer of the department. The regents also may appoint and, at pleasure, remove a deputy commissioner of education, who shall perform such duties as the regents may assign to him by rule and who, in the absence or disability of the commissioner or when a vacancy exists in the office of commissioner shall exercise and perform the functions, powers and duties conferred or imposed on the commissioner by this chapter. The regents of The University of the State of New York shall continue to constitute a board and The University of the State of New York, which was continued under such name by section two of article eleven of the constitution, shall continue to be governed and all its corporate powers to be exercised by such board.

Section 201. Corporate name and objects.

The corporation created in the year seventeen hundred eighty-four under the name of The Regents of the University of the State of New York, is hereby continued under the name of The University of the State of New York. Its objects shall be to encourage and promote education, to

visit and inspect its several institutions and departments, to distribute or to expand or administer for them such property and funds as the state may appropriate therefor or as the university may own or hold in trust or otherwise, and to perform such other duties as may be intrusted to it. The said corporation shall have power to take, hold and administer real and personal property and the income thereof in trust for any educational, scientific, historical or other purpose within the jurisdiction of the regents of The University of the State of New York.

Section 207. Legislative power.

Subject and in conformity to the constitution and laws of the state, the regents shall exercise legislative functions concerning the educational system of the state, determine its educational policies, and, except as to the judicial functions of the commissioner of education, establish rules for carrying into effect the laws and policies of the state, relating to education, and the functions, powers, duties and trust conferred or charged upon the university and the education department. But no enactment of the regents shall modify in any degree the freedom of the governing body of any seminary for the training of priests or clergymen to determine and regulate the entire course of religious, doctrinal or theological instruction to be given in such institution. No rule by which more than a majority vote shall be required for any specified action by the regents shall be amended, suspended or repealed by a smaller vote than that required for action thereunder. Rules or regulations, or amendments or repeals thereof, adopted or prescribed by the commissioner of education as provided by law shall not be effective unless and until approved by the regents, except where authority is conferred by the

regents upon the commissioner of education to adopt, prescribe, amend or repeal such rules or regulations.

Section 801. Courses of instruction in patriotism and citizenship and in certain historic documents.

1. In order to promote a spirit of patriotic and civic service and obligation and to foster in the children of the state moral and intellectual qualities which are essential in preparing to meet the obligations of citizenship in peace or in war, the regents of The University of the State of New York shall prescribe courses of instruction in patriotism and citizenship, to be maintained and followed in all the schools of the state. The boards of education and trustees of the several cities and school districts of the state shall require instruction to be given in such courses, by the teachers employed in the schools therein. All pupils attending such schools, over the age of eight years, shall attend upon such instruction.

Similar courses of instruction shall be prescribed and maintained in private schools in the state, and all pupils in such schools over eight years of age shall attend upon such courses. If such courses are not so established and maintained in a private school, attendance upon instruction in such school shall not be deemed substantially equivalent to instruction given to pupils of like age in the public schools of the city or district in which such pupils reside.

2. The regents shall prescribe courses of instruction in the history, meaning, significance and effect of the provisions of the constitution of the United States, the amendments thereto, the declaration of independence, the constitution of the State of New York and the amendments thereto, to be maintained and followed in all of the schools of

the state. The boards of education and trustees of the several cities and school districts of the state shall require instruction to be given in such courses, by the teachers employed in the schools therein. All pupils attending such schools, in the eighth and higher grades, shall attend upon such instruction.

Similar courses of instruction shall be prescribed and maintained in private schools in the state, and all pupils in such schools in grades or classes corresponding to the instruction in the eighth and higher grades of the public schools shall attend upon such courses. If such courses are not so established and maintained in a private school, attendance upon instruction in such school shall not be deemed substantially equivalent to instruction given to pupils in the public schools of the city or district in which such pupils reside.

3. The regents shall determine the subjects to be included in such courses of instruction in patriotism and citizenship and in the history, meaning, significance and effect of the provisions of the constitution of the United States, the amendments thereto, the declaration of independence, the constitution of the state of New York and the amendments thereto, and the period of instruction in each of the grades in such subjects. They shall adopt rules providing for attendance upon such instruction and for such other matters as are required for carrying into effect the objects and purposes of this section. The commissioner of education shall be responsible for the enforcement of such section and shall cause to be inspected and supervise the instruction to be given in such subjects. The commissioner may, in his discretion, cause all or a portion of the public school money to be apportioned to a district or city to be withheld for failure of the school authorities of

such district or city to provide instruction in such courses and to compel attendance upon such instruction, as herein prescribed, and for a non-compliance with the rules of the regents adopted as herein provided.

4. The regents shall designate a week during each year and prescribe a uniform course of exercises in the public schools of the state suitable for pupils of various ages to instill into the minds of such pupils the purpose, meaning and importance of the bill of rights articles in the federal and state constitutions. Such exercises shall be in addition to any prescribed courses of study in the schools.

Interest of *Amicus Curiae*

The Board of Regents is the head of the University of the State of New York and of the State Education Department, pursuant to New York State Constitution, Article V, Section 4, Article XI, Section 2, and New York State Education Law, Sections 101 and 201.

The Board of Regents is charged by law with the general management and supervision of all public schools and all of the educational work of the State, exercises legislative functions concerning the educational system of the State, determines its educational policies and establishes rules for carrying into effect the laws and policies of the State relating to education (Education Law, Sections 101 and 207).

In the exercise of its duties and functions, the Board of Regents, on November 30, 1951, adopted a Statement of Belief on Moral and Spiritual Training in the Schools and, on March 25, 1955, adopted Recommendations for School Programs on AMERICA'S MORAL & SPIRITUAL HERITAGE, copies of which are attached hereto and made a part hereof, as Appendices A and B, respectively.

Respondent-Respondent Board of Education has followed the Recommendation of the Board of Regents in relation to the prayer contained in such Statements, and has instructed its staff to have the same used daily, as recommended, in conjunction with the Pledge of Allegiance, and the same has been so used since September 1958, except for certain changes which we understand the Board of Education made in its procedures in compliance with Mr. Justice Meyer's order below which was affirmed by the Appellate Division, Second Judicial Department.

The Board of Regents, accordingly, is deeply interested in the litigation here involved and consequently supports the decisions of the Courts below which upheld the constitutionality of the prayer recommended by *Amicus Curiae*.

Summary of Argument

It is the position of *Amicus Curiae* that the prayer recommended by them to be used in the public schools of the State of New York, in conjunction with the Pledge of Allegiance to the Flag, does not and cannot violate the provisions of the First Amendment to the United States Constitution:

(1) Because the wording of the prayer is derived from the language used in the Declaration of Independence, in Lincoln's Gettysburg Address, in U. S. Code, Title 36, Chapter 10, Section 172, and in the State Constitutions of all but one of the States of the Union.

(2) Because the language used in the recommendation of *Amicus Curiae* is in line with previous decisions of this Court, and in line with national institutions of various kinds, such as certain official holidays, official oaths of office, the invocation by the Marshall of

this Court before the opening of each session, inscriptions on coins, and many others.

(3) Because the recommendation carries out certain mandates of the New York State Education Law requiring *Amicus Curiae* to prescribe for use in the State courses of instruction in the history and significance of the Constitutions of the United States, its amendments, the Declaration of Independence, and others.

(4) Because the recommendation is made on the basis of the understanding and recognition that the use of this prayer cannot be enforced against students whose conscience or religious beliefs forbids them to participate.

(5) Because, as demonstrated by Madison's "Memorial and Remonstrance," such prayer is not in violation of the spirit and intent of the framers of the First Amendment to the United States Constitution.

POINT I

The use of the recommended prayer by Respondent-Respondent School Board is not in violation of the Constitution of the United States of America, nor of the Constitution of the State of New York.

A. It should be pointed out at the outset that each member of the Board of Regents must take the constitutional oath of office, which reads as follows:

> "I do solemly swear (or affirm) that I will support the constitution of the United States, and the constitution of the State of New York, and that I will faithfully discharge the duties of the office of . . . according to the best of my ability."

It must also be pointed out that the Board of Regents, at the times of the adoption of the Statements referred to above, counted five attorneys among its members (William J. Wallin of Yonkers, Welles V. Moot of Buffalo, John F. Brosnan of New York, Jacob L. Holtzmann of New York, and George L. Hubbell, Jr. of New York), including a former President of the New York County Lawyers Association (John F. Brosnan, Chancellor of the Board of Regents until April 1, 1961); and that the Board now is, and then was, served by a Counsel who has been on the Board's legal staff since 1923, Director of the Law Division since 1932 and Counsel since 1941.

Consequently, it is apodictic that the Board of Regents at the times here involved was, as it now is, fully aware of and conversant with the doctrine of separation of Church and State. The Board is, needless to say, firmly and unalterably convinced of the paramount importance of this basic constitutional doctrine, both as the powerful bulwark of religious freedom and as the only possible guarantee of protection against religious strife among our people.

The Board, nevertheless, is also aware of the dire need, in these days of concentrated attacks by an atheistic way of life upon our world and in these times of rising juvenile delinquency, of crime increasing both numerically and in gravity of offense, with an ever-swelling number of criminals being counted in the younger age groups, of finding ways to pass on America's Moral and Spiritual Heritage to our youth through the public school system.

The Statements hereinabove referred to were a result of this effort.

With the increasing number of divorces, annulments and separations, and the resulting broken homes, rising numbers

of our youth are being deprived of moral and spiritual guidance. Hence, the role of the public school system, in supplying this need, *to the extent that it may properly do so*, becomes of the greatest import and significance in our national life.

Thus, the Board of Regents devised a prayer recommended to be used as an incident to and part of the Pledge of Allegiance ceremony, which would strengthen the sense of interdependence of our way of life and the belief in a Supreme Being acknowledged by the great mass of organic utterances and, throughout our history, by all presidents and national leaders in all walks of life.

The prayer reads as follows:

> "Almighty God, we acknowledge our dependence upon Thee, and we beg Thy blessings upon us, our parents, our teachers and our Country."

It will be noted that this prayer is divisible into three basic parts:

1. The invocation of "Almighty God."

   This invocation is contained, verbatim, in the Constitution of the State of New York, and in the Constitutions of 33 other States (Alabama, Arizona, Arkansas, California, Florida, Georgia, Idaho, Illinois, Indiana, Kansas, Kentucky, Louisiana, Maryland, Michigan, Mississippi, Montana, Nebraska, Nevada, New Jersey, New Mexico, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Dakota, Tennessee, Texas, Utah, Vermont and Wisconsin).

2. "* * * we acknowledge our dependence upon Thee * * *".

The acknowledgement of dependence upon God is contained, in one form or another, in the Constitution of every State of the Union, including those of Alaska, and of Hawaii.*

It is also contained in the Declaration of Independence, in Lincoln's Gettysburg Address, and in U. S. Code, Title 36, Chapter 10, Section 172, as amended in 1954 (see *Lewis* v. *Allen*, 5 Misc. 2d 68; affd. 11 A. D. 2d 447).

3. "* * * we beg Thy blessings upon us * * *".

An express acknowledgment or invocation of the "blessing" or "blessings" [of a Supreme Being], consisting of our freedoms and national heritage, is contained both in the Preamble to the Constitution of the United States (". . . the Blessings of Liberty . . ."), the Constitution of the State of New York and the Constitutions of 28 other States (Alabama, Arkansas, California, Colorado, Florida, Idaho, Illinois, Iowa, Kentucky, Louisiana, Maine, Michigan, Minnesota, Mississippi, Montana, Nevada, New Jersey, New Mexico, North Carolina, North Dakota, Ohio, Oklahoma, Pennsylvania, Rhode Island, South Dakota, Texas, West Virginia and Wisconsin).

How, then, can it be seriously argued that a prayer, combining these various phrases, culled from the basic law of the land, and used as an incidental part of the Pledge of

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* The preamble of the proposed constitution of Hawaii, for instance, reads as follows:

"We, the people of the State of Hawaii, *grateful for Divine Guidance*, and mindful of our Hawaiian heritage, reaffirm our belief in a government of the people, by the people, and for the people, and with an understanding heart toward all the people of the earth, do hereby ordain and establish this constitution for the State of Hawaii." (Emphasis supplied)

Allegiance ceremony in the public schools, is in violation of any Constitution?

Without in any way detracting from the effectiveness and potency of our immutable principle of separation of Church and State, it must be pointed out that this principle is by no means one of hostility to religion, but is, in effect, designed to protect, forever, our freedom of religion and conscience, under which every man is free to conduct himself in that respect according to his own convictions.

Throughout our history, the recognition that "this is a religious nation" (*Church of Holy Trinity* v. *U. S.*, 1892, 143 U. S. 457 at 470); that "We are a religious people whose institutions presuppose a supreme being" (*Zorach* v. *Clauson*, 1951, 343 U. S. 306 at 313); that "The American people are and always have been theistic" (*Doremus* v. *Board of Education*, 5 N. J. 435; appeal dismissed 342 U. S. 429, 1952), merely takes cognizance of the fact that "From the discovery of this continent to the present hour, there is a single voice making this affirmation" (*Church of Holy Trinity* v. *U. S.*, *supra*).

It is not the intent of *Amicus Curiae* to burden the Court with a repetition of the many arguments so ably presented in the lengthy briefs of Respondent-Respondent Board of Education and of Intervenors-Respondents. Suffice it to point to the role played in our history and national life of such institutions and facts as:

Christmas and Easter vacations and holidays;

The observance of Sunday (pursuant to laws upheld consistently by the Courts);

Thanksgiving Day, established by Presidential Proclamation;

The Presidential Oath of Office;

The invocation by the Marshal of the United States Supreme Court before the opening of each session ("God save the United States and this Honorable Court").

The invocation and benediction said before and after all sessions of Congress, State Legislatures and official boards and bodies;

The oath used in judicial process;

The inscription on our coins, stamps and bank notes.

It would be carrying coals to New Castle to even try to list all the historic documents of our past which recognize our dependence on Almighty God and invoke his "Blessing". Their number is legion, and many of the decisions cited and quoted in Respondent-Respondent's (Board of Education) brief also list them, such as *Church of Holy Trinity* v. *U. S.*, *supra*. The Court there skims the surface of the wealth of available material, from Christopher Columbus' Commission for Discovery, Sir Walter Raleigh's First Colonial Grant, the early Charters of Virginia and other colonies, the famous Compact of the Pilgrims, the Fundamental Orders of Connecticut, the Pennsylvania Charter of Privileges, to the Declaration of Independence and the Constitutions referred to above, along with others.

A comprehensive list of such documents would fill volumes, and too much has been written about the subject to further dwell on it here.

These and many other instances prove what the Courts have stated again and again that, in the words of *Everson* (330 U. S. at 18):

> "State power is no more to be used so as to handicap religions than it is to favor them."

or in the words of *McCollum* (333 U. S. 203):

> "To hold that a state cannot consistently with the First and Fourteenth Amendments utilize its public school system to aid any or all religious faiths or sects in the dissemination of their doctrines and ideals *does not* as counsel urge *manifest a governmental hostility to religion, or religious teachings. A manifestation of such hostility would be at war with our national tradition as embodied in the First Amendment's guaranty of the free exercise of religion.*" (Emphasis supplied).

It is noted also that the Education Law (Section 801) charges *Amicus Curiae* with the duty

> "to promote a spirit of patriotic and civic service and obligation and to foster in the children of the state moral and intellectual qualities which are essential in preparing to meet the obligations of citizenship in peace or in war * * *."

and lists, specifically, a duty for them to prescribe

> "courses of instruction in the history, meaning, significance and effect of the provisions of the constitution of the United States, the amendments thereto, the declaration of independence, the constitution of the State of New York, and the amendments thereto * * *."

Included in this, through the Declaration of Independence, are such phrases as "nature's God", "endowed by their Creator with certain unalienable rights * * *", "the Supreme Judge of the World", "the protection of Divine Providence".

B. It is submitted that the addition of the prayer in question to the Pledge of Allegiance ceremony in the public schools does not interfere with the proper accommodation

of the two constitutional principles here involved: The First Amendment to the Constitution of the United States on the one side; and the exercise of the reserved power of the States over education, including the need to familiarize all public school pupils, regardless of creed, with the religious nature of our national heritage, on the other side.

It is submitted that the acceptance by school boards of the Recommendation of *Amicus Curiae* in this respect does not constitute a "law respecting an establishment of religion".

The question here is, whether or not the prayer recommended by *Amicus Curiae* amounts to "an establishment of religion" within the meaning of the First Amendment to the United States Constitution, and as that phrase was used by the framers of the Amendment.

Hence, it becomes important to search out what that term meant to the Founding Fathers.

One of the most eloquent and effective architects of the Amendment was James Madison. And, probably the strongest expression of the sentiments in favor of separation of Church and State, prevailing at the time in Virginia, is a document drafted by James Madison, and which gained the approval and signatures of an overwhelming number of the citizens of Virginia, *viz.*, his famous "Memorial and Remonstrance" against a bill introduced in the Virginia Legislature, providing for tax support of Teachers of the Christian Religion.

The importance of this document in the interpretation of the First Amendment is emphasized by the fact that the United States Supreme Court, in 1947, referred to it extensively, in the *Everson* case (330 U. S. 1, 12, 13, 34, 63).

The term "establishment" or "establish" is used at least eight times in the document.

Thus, we see that the enactment of a bill raising a general tax for the advancement of all religions was considered by Madison "an establishment of religion".

Thus, we further see that he considered religion to be wholly exempt from tax or other compulsory support by government enactment of any kind, because any such support would be a violation of religious liberty and of the equal right to the free exercise of religion by all citizens. Any such support, consequently, he considered to be "an establishment of religion".

So much clearly is said by Madison.

The question now is—*did he consider an invocation of the Deity in general terms and without use of denominational terminology*[1] *to be in the nature of such "an establishment of religion"?*

It is obvious that the answer, if one can be found, is determinative of the issue here to be briefed. *The answer can indeed be found for it is in fact contained in the document itself and in Madison's own words.*

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[1] *Cf.* the passage in Jefferson's Autobiography (quoted in Norman Cousins' book "In God We Trust" "The Religious Beliefs and Ideas of the American Founding Fathers", p. 120) which speaks of the proposed change in the "Act for Establishing Religious Freedom" passed by the Virginia Assembly in 1786 (*ibidem*, p. 125): "Where the preamble declares, that coercion is a departure from the plan of the holy author of our religion, an amendment was proposed, by inserting the word 'Jesus Christ' so that it should read 'a departure from the plan of Jesus Christ, the holy author of our religion': the insertion was rejected by a great majority, in proof that they meant to comprehend, within the mantle of its protection, the Jew and the Gentile, the Christian and Mohometan, the Hindoo, and Infidel of every denomination."

It must be remembered here that this Memorial and Remonstrance was addressed "To The Honorable The General Assembly of the Commonwealth of Virginia" by a member of the House of Delegates serving on the Committee on Religion.

It must also be remembered that it was not lightly that Madison entered upon the drafting of this document, having deliberately stayed out of personal participatior in this controversy[2], and that he was asked by a group of prominent Virginians to draft the document.[3]

It is obvious, therefore, as it is from a reading of the Memorial itself that the author put a great deal of careful thought into the draft and would not have included anything therein which, in his thinking, would have been contrary to the purpose of the document.

With this in mind we peruse the following closing passage of the Remonstrance:

> "And that no effort may be omitted on our part against so dangerous an usurpation, we oppose to it, this remonstrance; *earnestly praying, as we are in duty bound, that the Supreme Lawgiver of the Universe, by illuminating those to whom it is addressed, may on the one hand, turn their councils from every act which would affront his holy prerogative, or violate the trust committed to them; and on the other, guide them into every measure which may be worthy of his* [*blessing*, may re]dound to their own praise, and may establish more firmly the liberties, the prosperity, and the Happiness of the Commonwealth." (Emphasis supplied)

It is, therefore, earnestly submitted that the question whether or not such a prayer is in the nature of "an es-

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[2] See Madison's Letter to Edmund Randolph, July 26, 1785.

[3] See Madison's Letter to George Mason, July 14, 1826.

tablishment of religion", as Madison himself used the term, *must clearly be answered in the negative.*

Had he considered an official invocation of the Diety or such an acknowledgment of human dependence upon Him to be objectionable in the light of the principle of separation of Church and State, he most certainly would not have concluded this most important official document with such an invocation and acknowledgment.

It is thus clear that the recognition of, and acknowledgment of, our dependence on "the Supreme Lawgiver of the Universe" was, in Madison's own thinking, not only proper, but his *duty* ("as we are in duty bound") in the transaction of important functions of the body politic.

What is true of that recognition and acknowledgment, it is submitted, is without question also true of the recognition and acknowledgment of the Deity contained in the prayer recommended by *Amicus Curiae.*

The wealth of available materials in legislative enactments, letters and statements of the Founding Fathers makes it impractical to illustrate the above on more than one example, such as the document discussed hereinabove.

Since the example selected, however, is probably the strongest expression of the principle of separation of Church and State, and since even that very document makes it clear that the recommended prayer is unobjectionable, it is, therefore, respectfully submitted that the use of the prayer recommended by *Amicus Curiae* for use in the public schools of the State of New York, in connection with and as an incident to the Pledge of Allegiance ceremony, is not in violation of the First Amendment to the United States Constitution, and that, therefore, the petition herein should be dismissed on the merits.

Since there is no compulsion whatever about the recommended use of this prayer, it is obvious that its use does not "prohibit the free exercise of religion" within the meaning of the Federal Constitution.

For the same reasons stated above, in relation to the Federal Constitution, it is further submitted that such acceptance of the Recommendation of *Amicus Curiae* does not interfere with the "free exercise and enjoyment of religious profession and worship without discrimination or preference", nor with the "liberty of conscience", secured by the Constitution of the State of New York.

It must be stated here that this case does not deal with a situation where petitioners' children were or are being *forced* to recite a prayer contrary to their beliefs, either in wording, required posture during the prayer, or even by required presence during the same.

Amicus Curiae is fully aware of such decisions as *Bolling* v. *Superior Court*, 16 Washington 2nd, 373, or *West Virginia State Board of Education* v. *Barnette*, 319 U. S. 624; or the great and moving concurring opinion of Judge Lehman in *People* v. *Sandstrom*, 279 N. Y. 523, 533.

The Recommendation was made, therefore, with the implicit understanding that no child would ever be forced, contrary to its conscience, to recite this prayer or even the words "under God" in the Pledge of Allegiance, or even the Pledge itself. Schools are expected and, on appeal to the Commissioner of Education under Section 310 of the New York State Education Law, in a proper case, would be ordered to accommodate each child according to his conscience and his parents' wishes, by either allowing him to leave the room, or to remain silent throughout the ceremony, or a proper part thereof, as the case may be.

C. It is, finally, submitted that if petitioners here are trying to *prevent* their children and others of their respective persuasions from any *exposure* to the fact that the great majority of the citizens of this country have throughout its history acknowledged, and do now acknowledge, the existence of a Divine Being, both as a matter of national history and as a matter of present fact, *they are indeed asking for the impossible.*

This would require the omission of a large, if not the greater, part of all history in the course of instruction and, as far as today's facts of like are concerned, would be even more impossible. Pupils are being transported to religious schools in this State (both under the *Everson* case and a 1939 amendment to the New York State Constitution). The released time program (*Zorach* and several New York State cases) is in effect in many school districts. Thus, pupils must be immediately aware of the fact that some children attend religious schools and that some children attend religious instruction under the released time program. Children, further, cannot help but notice the fact that churches and synagogues exist and that people stream to them at certain times. As soon as children can read, they cannot help but notice the inscription "In God We Trust" on the coins which they are given to purchase candy or chewing gum.

Thus, it is obvious that the child at a very early age is bound to come in contact with the word and concept "God", and their connection with our life, history and national heritage. This contact and knowledge cannot and should not be eliminated from any child's life, even though he has every right to disagree.

POINT II

The petition for writ of certiorari should be denied.

It is, therefore, respectfully submitted that the use of the prayer recommended by *Amicus Curiae* for use in the public schools of the State of New York, in connection with and as an incident to the Pledge of Allegiance ceremony, neither violates the doctrine of separation of Church and State, nor any other provision of the Constitution of the United States, nor the Constitution of the State of New York, and that, therefore, the petition for writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX A

THE UNIVERSITY OF THE STATE OF NEW YORK

THE STATE EDUCATION DEPARTMENT ALBANY

THE REGENTS STATEMENT ON MORAL AND SPIRITUAL TRAINING IN THE SCHOOLS

BELIEF IN and dependence upon Almighty God was the very cornerstone upon which our Founding Fathers builded.

Our State Constitution opens with these solemn words: "We, the People of the State of New York, grateful to Almighty God for our Freedom, in order to secure its blessings, do establish this Constitution."

We are convinced that this fundamental belief and dependence of the American—always a religious—people is the best security against the dangers of these difficult days. In our opinion, the securing of the peace and safety of our country and our State against such dangers points to the essentiality of teaching our children, as set forth in the Declaration of Independence, that Almighty God is their Creator, and that by Him they have been endowed with their inalienable rights of life, liberty, and the pursuit of happiness.

We believe that at the commencement of each school day the act of allegiance to the Flag might well be joined with this act of reverence to God: "Almighty God, we acknowledge our dependence upon Thee, and we beg Thy blessings upon us, our parents, our teachers and our Country."

We believe that the school day thus started might well include specific programs stressing the moral and spiritual heritage which is America's, the trust which our pioneering ancestors placed in Almighty God, their gratitude to Him from Whom they freely and frequently acknowledged

came their blessings and their freedom and their abiding belief in the free way of life and in the universal brotherhood of man based upon their acknowledgment of the fatherhood of their Creator, Almighty God, Whom they loved and reverenced in diverse ways.

We believe that thus constantly confronted with the basic truth of their existence and inspired by the example of their ancestors, our children will find all their studies brought into focus and accord, respect for lawful authority and obedience to law will be the natural concomitant of their growth, and each of them will be properly prepared to follow the faith of his or her father, as he or she receives the same at mother's knee, by father's side, and as such faith is expounded and strengthened for them by his or her religious leaders.

We believe that thus the school will fulfill its high function of supplementing the training of the home, ever intensifying in the child that love for God, for parents and for home which is the mark of true character training and the sure guarantee of a country's welfare.

We believe that such is the best way of insuring that this Government and our way of life shall not perish from the earth.

We believe that this Statement will be subscribed to by all men and women of good will, and we call upon all of them to aid in giving life to our program.

The foregoing statement of belief was unanimously adopted by the State Board of Regents at its regular meeting on November 30, 1951.

R967m-Je56-2000(39908)*

APPENDIX B

THE *REGENTS' RECOMMENDATIONS*
FOR *SCHOOL PROGRAMS* ON
AMERICA'S MORAL &
SPIRITUAL *HERITAGE*

* * * * * * * *

THE REGENTS' RECOMMENDATIONS
FOR SCHOOL PROGRAMS ON
AMERICA'S MORAL & SPIRITUAL HERITAGE

Unanimously Adopted *by the* Regents
March 25, 1955

*

The UNIVERSITY of the STATE
of NEW YORK

The State Education Department
Albany
1955

The UNIVERSITY of the STATE
of NEW YORK

Regents of the University

WILLIAM J. WALLIN, A. M., LL. D.,
Chancellor Emeritus, Yonkers

JOHN P. MYERS, A. B., D. Sc., LL. D., D. Eng.,
Chancellor, Plattsburgh

EDWARD R. EASTMAN, LL. D., Litt. D.,
Vice Chancellor, Ithaca

Appendix B.

Welles V. Moot, A. B., LL. B., LL. D.,
Buffalo

Mrs. Caroline Werner Gannett, L. H. D., LL. D.,
Rochester

Roger W. Straus, Litt. B., LL. D., L. H. D., D. H. L.,
New York

Dominick F. Maurillo, A. B., M. D., LL. D.,
Brooklyn

John F. Brosnan, A. M., LL. B., J. D., LL. D., D. C. L.
New York

Jacob L. Holtzmann, LL. B., LL. D., D. C. L.,
New York

Edgar W. Couper, A. B., LL. D.,
Binghamton

Alexander J. Allan, Jr., LL. D., Litt. D.,
Troy

Thad L. Collum, C. E.,
Syracuse

George L. Hubbell, Jr., A. B., LL. B.,
New York

AMERICA'S MORAL & SPIRITUAL HERITAGE

On November 30, 1951, the Regents issued their Statement on Moral and Spiritual Training in the Schools, which opened with these words: "Belief in and dependence upon Almighty God was the very cornerstone upon which our Founding Fathers builded."

In such Statement, the Regents expressed their convictions that such fundamental belief and dependence is the best security against the dangers of these difficult days and the adoption of their recommendations the best way of insuring that this Government and our way of life shall not perish from the earth.

Such Statement contemplated the issuance of a Supplemental Statement setting forth the Regents' recommendations for programs in the schools stressing the Moral and Spiritual Heritage of America. This is the Supplemental Statement

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In putting such recommendations into effect teachers will be mindful always of the fundamental American doctrine of the separation of church and state, and careful at all times to avoid any and all sectarianism or religious instruction which advocates, teaches or prefers any religious creed. Formal religion is not to be injected into the public school. It is a matter for the church and the home, for the religious leaders and the parents of each child.

6

FUNDAMENTAL BELIEFS

LIBERTY *under* GOD • RESPECT *for the* DIGNITY & RIGHTS *of* EACH INDIVIDUAL • DEVOTION *to* FREEDOM

The Brotherhood of Man
under the Fatherhood of God

Our Founding Fathers set forth in the Declaration of Independence, with unequaled clarity and simplicity, the fundamental moral and spiritual ideals of this Nation:

Appendix B.

We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness. That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed. . . .

"All men are created equal" is the basic principle of the Brotherhood of Man, and "endowed by their Creator with life, liberty and the pursuit of happiness" is the recognition of the Fatherhood of God, and that these most precious rights come from the Creator and

not from the kings, princes or other men. The proposition that "government derives its just powers from the consent of the governed" is a recognition of the dignity, worth and sovereignty of each individual under God and of the concept of the individual as a sovereign citizen, who, with his fellow citizens, is master of the state they have created and not its servant.

The American people have always been a religious people, believing in God each in accordance with his own conscience. As our Supreme Court well stated, "We are a religious people whose institutions presuppose a Supreme Being."

The Constitution of the State of New York opens with these solemn words: "We, the People of the State of New York, grateful to Almighty God for our Freedom, in order to secure its blessings, do establish this Constitution."

Appendix B.

The Great Seal of the United States has as its symbol for future generations an unfinished pyramid of thirteen steps, representing the thirteen colonies, which pyramid is placed under the eye of God, and the motto, "Annuit Coeptis," meaning "He Has Favored Our Undertaking." This motto is repeated on every dollar bill, and our common coins and stamps carry the words, "In God We Trust."

Our Presidents and other great leaders again and again have recalled to our people their dependence upon Almighty God and their obligations to their fellow men, and the necessity of vigilantly protecting their liberty and their freedom. From the countless stream of quotations we cull the following:

At the Constitutional Convention in Philadelphia, Washington, as Chairman, set the spiritual tone for the sessions when he said: "Let us raise a standard to which the wise and honest can repair. The event is in the hand of God."

8

When the delegates at the Convention seemed hopelessly in disagreement, Benjamin Franklin, "imploring the assistance of Heaven," said, "I have lived, Sir, a long time, and the longer I live, the more convincing proofs I see of this truth—that God Governs in the affairs of men."

• • •

Washington, in taking his oath of office at his First Inaugural, said:

> *No people can be bound to acknowledge and adore the Invisible Hand which conducts the affairs of men more than those of the United States. Every step by*

which they have advanced to the character of an independent nation seems to have been distinguished by some token of providential agency; and in the important revolution just accomplished and in the system of their united government the tranquil deliberations and voluntary consent of so many distinct communities from which the event has resulted can not be compared with the means by which most governments have been established without some return of pious gratitude, along with an humble anticipation of the future blessings which the past seems to presage. . . .

• • •

Again, in his Farewell Address, Washington puts his convictions into these enduring words: "Of all the dispositions and habits which lead to political prosperity, religion and morality are indispensable supports. . . . reason and experience both forbid us to expect that national morality can prevail in exclusion of religious principle."

• • •

Abraham Lincoln at Gettysburg said:

Four score and seven years ago our fathers brought forth on this continent, a new nation, conceived in Liberty, and dedicated to the proposition that all men are created equal.

9

He added that our soldiers fought and died there so "that this nation, under God, shall have a new birth of freedom—and that government of the people, by the people, for the people, shall not perish from the earth."

• • •

In another address these were his words:

> *Our reliance is in the love of liberty which God has planted in us. Our defense is in the spirit which prized liberty as the heritage of all men, in all lands everywhere. Destroy this spirit and you have planted the seeds of despotism at your own doors.*

• • •

And in one of his last public speeches he uttered the sublime thought:

> *With malice toward none, with charity for all, with firmness in the right as God gives us to see the right, let us strive on to finish the work we are in, to bind up the nation's wounds, . . . to do all which may achieve and cherish a just and lasting peace among ourselves and with all nations.*

• • •

In all these expressions Lincoln put into words the spiritual motivations for the sacrifices made not only by the heroes of Gettysburg and the other battles of the Civil War, but also of all Americans who have gone into battle, whether at Lexington, San Juan Hill, the Argonne Forest, Iwo Jima or Heartbreak Ridge.

• • •

Woodrow Wilson, in urging the American people to extend the principles of the Founders of this Republic into the realm of world leadership, said: "I summon all honest men, all patriotic, all forward-looking men to my side. God

helping me, I will not fail them, if they will but counsel and sustain me!"

10

Finally, President Eisenhower brings our national moral and spiritual ideals down to date in these words: "Without God there could be no American form of government, nor an American way of life. . . . Thus the Founding Fathers saw it; and thus, with God's help, it will continue to be. . . . The path we travel is narrow and long—beset with many dangers. Each day we must ask that Almighty God will set and keep His protecting hand over us so that we may pass on to those who come after us the heritage of a free people, secure in their God-given right and in full control of a government dedicated to the preservation of those rights."

Throughout our entire history as a Nation, these Fundamental Beliefs have been our moral and spiritual ideals, our guiding star and our compass in time of storm and trouble. They should be a living part of the lives of all our children.

• • •

Devotion to Freedom

How well this is expressed in these challenging words of Thomas Jefferson: "I have sworn upon the altar of God, eternal hostility against every form of tyranny over the mind of man."

Our freedom of speech and worship and of the press, and to do all things which do not harm others, are highly important, but of even greater importance is the desire and

will of the people to have them and to preserve them. The only way for freedom-loving people to secure the "blessings of liberty to ourselves and our posterity" is eternal vigilance through actions that are in response to the Moral Law. In the words of the Chancellor of the Board of Regents, opening our 1953 Convocation, "Freedom is not free—it must constantly be defended and cared for lest we lose it. That is the price we pay for it. We must reinterpret for our children the initiative, the courage and the faith of the Founding Fathers. We must root deeply in their hearts faith in the unimpeachable dignity of the individual and in the unquenchable spirit of free man."

11

Stressing Moral & Spiritual Values

We recommend:

First: That periods be set aside at frequent intervals during the school year which will be devoted to the intensive study of the foregoing fundamental and great American documents and pronouncements. The same will give to the student an understanding and appreciation of his role as an individual endowed by his Creator with inalienable rights and as a member of a group similarly endowed; of respect for others, particularly parents and teachers, of devotion to freedom and of reverence for Almighty God. Thus, as we heretofore stated, "the school will fulfill its high function of supplementing the training of the home, ever intensifying in the child that love for God, for parents and for home which is the mark of true character training and the sure guarantee of a country's welfare."

• • •

SECOND: The development of moral and spiritual values through all the activities and lessons of the school day and particularly by the good example of the school staff. For instance, sports and games may be used to build a sense of fair play, a willingness to lose a game rather than cheat, a desire to do to others as you would be done by and of striving to build a healthy mind and body. The study of science will develop honest dealing with facts, an open mind for new ideas and a keen alertness for the views and experiences of others, respect for truth and humility as one contemplates the vastness of space, the minuteness of the atom and the reign of law and order in the Universe. Biography will keep before pupils inspired examples of character, and encourage them with "the habitual vision of greatness." Friendship among pupils of inter-racial groups will constitute a strong bulwark against prejudice and intolerance.

12

Thus our children, inspired by the example of their ancestors, guided by the faith and love of their parents and encouraged by their spiritually sensitive teachers, will renew in their daily lives America's Moral and Spiritual Heritage:

LIBERTY *under* GOD • RESPECT *for the* DIGNITY
& RIGHTS *of* EACH INDIVIDUAL •
DEVOTION *to* FREEDOM

13

Certificate of Service

I, Charles A. Brind, attorney for Board of Regents of the University of the State of New York, *amicus curiae* herein and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 7th day of November, 1961, I served copies of the foregoing motion for leave to file a brief as *amicus curiae* and brief of *amicus curiae* on the several parties to the written proceeding as follows:

On Steven I. Engel, Daniel Lichtenstein, Monroe Lerner, Lenore Lyons and Lawrence Roth, petitioners, by mailing copies in a duly addressed envelope with proper postage prepaid, to their respective attorneys of record, as follows:

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On William J. Vitale, Jr., Philip J. Freed, Mary Harte, Anne Birch and Richard Saunders, respondents, by mailing copies in a duly addressed envelope with proper postage prepaid, to their respective attorneys of record, as follows:

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On Henry Hollenberg, Rose Levine, Martin Abrams, Helen Swanson, Walter F. Gibb, Jane Ehlen, Ralph B. Webb, Virginia Zimmerman, Virginia Davis, Violet S. Cox, Evelyn Koster, Irene O'Rourke, Rosemarie Petelenz, Daniel J. Reehil, Thomas Delaney and Edward L. Mac-

Certificate of Service.

Farlane, intervenor-respondents, by mailing copies in a duly addressed envelope with proper postage prepaid, to their respective attorneys of record, as follows:

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Supreme Court of the United States

OCTOBER TERM, 1961

NO. 468

In the Matter of the Application of

STEVEN I. ENGEL, DANIEL LICHTENSTEIN, MONROE LERNER, LENORE LYONS and LAWRENCE ROTH,

Petitioners-Appellants,

—against—

WILLIAM J. VITALE, JR., PHILIP J. FREED, MARY HARTE, ANNE BIRCH and RICHARD SAUNDERS, constituting the Board of Education of Union Free School District Number Nine, New Hyde Park, New York,

Respondents-Respondents,

directing them to discontinue a certain school practice,

—and—

HENRY HOLLENBERG, ROSE LEVINE, MARTIN ABRAMS, HELEN SWANSON, WALTER F. GIBB, JANE EHLEN, RALPH B. WEBB, VIRGINIA ZIMMERMAN, VIRGINIA DAVIS, VIOLET S. COX, EVELYN KOSTER, IRENE O'ROURKE, ROSE MARIE PETELENZ, DANIEL J. REEHIL, THOMAS DELA. EY and EDWARD L. MacFARLANE,

Intervenors-Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF NEW YORK

JOINT BRIEF OF RESPONDENTS AND INTERVENORS-RESPONDENTS OPPOSING CERTIORARI

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Supreme Court of the United States

OCTOBER TERM, 1961

No. 468

In the Matter of the Application of

STEVEN I. ENGEL, DANIEL LICHTENSTEIN, MONROE LERNER, LENORE LYONS and LAWRENCE ROTH,

Petitioners-Appellants,

—against—

WILLIAM J. VITALE, JR., PHILIP J. FREED, MARY HARTL, ANNE BIRCH and RICHARD SAUNDERS, constituting the Board of Education of Union Free School District Number Nine, New Hyde Park, New York,

Respondents-Respondents,

directing them to discontinue a certain school practice,

—and—

HENRY HOLLENBERG, ROSE LEVINE, MARTIN ABRAMS, HELEN SWANSON, WALTER F. GIBB, JANE EHLEN, RALPH B. WEBB, VIRGINIA ZIMMERMAN, VIRGINIA DAVIS, VIOLET S. COX, EVELYN KOSTER, IRENE O'ROURKE, ROSEMARIE PETELENZ, DANIEL J. REEHIL, THOMAS DELANEY and EDWARD L. MACFARLANE,

Intervenors-Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF NEW YORK

JOINT BRIEF OF RESPONDENTS AND INTERVENORS-RESPONDENTS OPPOSING CERTIORARI

Preliminary Statement

This Brief is submitted jointly on behalf of respondents and intervenors-respondents in opposition to the granting of the writ sought herein. Their opposition is based on two grounds:

(a) the judgment of the Court of Appeals of New York fully accords with the First and Fourteenth Amendments to the Federal Constitution, as interpreted by this Court in *Zorach* v. *Clauson*, 343 U.S. 306, and, under the standards promulgated by this Court for review on writ of certiorari, presents no reviewable federal question of substance;

(b) petitioners have improperly invoked the jurisdiction of this Court and, since their time to appeal or to petition for writ of certiorari on proper jurisdictional grounds has expired, no review by this Court may be had.

Jurisdiction of This Court

The judgment to which the Petition herein is directed was rendered on July 7, 1961 by the Court of Appeals of New York (see Remittitur annexed to Petition at p. 104). That judgment sustained the validity, as against attack on the ground of repugnance to the First and Fourteenth Amendments to the Constitution of the United States, of a resolution adopted July 8, 1958 by respondent Board of Education directing that the "Regents' Prayer" be "instituted as a daily procedure to follow the salute to the flag." * The jurisdiction of this Court to review that judgment by writ of certiorari is specifically invoked under 28

* The text of this resolution is set forth at pages 31-32 of Appendix A to this Brief.

U.S.C. §1254. Petitioners' time to seek review in this Court expired ninety days after entry of judgment in the New York Court of Appeals, or on October 5, 1961 (28 U.S.C. §2101). *Department of Banking* v. *Pink*, 317 U.S. 264, 267-68. No notice of appeal has been filed and no application has been made by petitioners to extend their time for filing a proper petition for writ of certiorari.

Questions Presented

1. Do the First and Fourteenth Amendments to the Federal Constitution compel the total abolition of every form of prayer on a voluntary basis in all the public school systems of this country?

2. More specifically, do the First and Fourteenth Amendments compel the total abolition of a brief non-denominational prayer composed by the Board of Regents of the University of the State of New York in language taken from the preambles of various state constitutions, in accordance with an historic tradition of public prayer; and which was recommended by the Regents for voluntary recital by public school pupils in conjunction with the pledge of allegiance to the flag in an attempt to provide in the public schools of New York a simple recognition of this country's moral and spiritual heritage, where there is no showing of any compulsion upon any pupil to participate, and when any pupil whose parents object is excused from participation?

3. Does not the fact that the resolution of respondent School Board was challenged below as repugnant to the United States Constitution and was held valid by the highest court of New York, require that any review in this Court be had solely by appeal under 28 U.S.C. §1257(2), and therefore necessitate dismissal or denial of the Petition

herein and, in the event that this Court finds that review is not available solely on appeal under 28 U.S.C. §1257(2), does not the fact that petitioners have invoked the jurisdiction of this Court under 28 U.S.C. §1254, rather than 28 U.S.C. §1257(3), require denial or dismissal of the Petition?

Constitutional and Statutory Provisions Involved

The texts of the following constitutional and statutory provisions involved herein are set forth in Appendix A to this Brief. The text of the Regents' Prayer is set forth at p. 5 of this Brief.

(a) United States Constitution, First Amendment

(b) United States Constitution, Fourteenth Amendment, Section 1

(c) United States Code, Title 28, Section 1254

(d) United States Code, Title 28, Section 1257

(e) United States Code, Title 28, Section 2101(c)

(f) United States Code, Title 28, Section 2103

(g) Resolution of Respondent Board of Education of Union Free School District Number 9, New Hyde Park, New York dated July 8, 1958.

Statement of the Case

A. The Background of the Regents' Prayer

The Regents' Prayer, which petitioners claim "may endanger the entire constitutional basis of our religious liberty" (Petition, p. 16) is a brief and simple acknowledgment of the existence of a Supreme Being. It is twenty-two words in length, requires approximately twelve seconds for recital, and reads:

> "Almighty God, we acknowledge our dependence upon Thee, and we beg Thy blessings upon us, our parents, our teachers and our Country" (R. 28).*

It was composed in 1951 by the Board of Regents of the University of the State of New York which is, and since 1784 has been, the highest educational authority in the State (N.Y. Const. Art. 5, §4; Art. 11, §2) and whose high standing and reputation are acknowledged throughout the educational world. Its language was borrowed from provisions appearing in the Constitutions of nearly all of the states of the Union. See Appendix D at p. 46.

The Prayer was recommended by the Regents as a means of:

> "* * * stressing the moral and spiritual heritage which is America's, the trust which our pioneering ancestors placed in Almighty God, their gratitude to Him from Whom they freely and frequently acknowledged came their blessings and their freedom and their abiding belief in the free way of life and in the universal brotherhood of man based upon their acknowledgment of the fatherhood of their Creator, Almighty God, Whom they loved and reverenced in diverse ways." (Regents' Statement on Moral and Spiritual Training in the Schools) (R. 28-29)**

In this Statement the Regents declared:

> "Belief in and dependence upon Almighty God was the very cornerstone upon which our Founding Fathers builded.
>
> Our State Constitution opens with these solemn words: 'We, the People of the State of New York,

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* Except as otherwise identified, references are to pages of the Papers on Appeal and Supplemental Papers on Appeal comprising the record below.

** The texts of this Statement and of the subsequent "Recommendation for School Programs on America's Moral and Spiritual Heritage" are set forth at pp. 33-43 of Appendix B to this Brief.

grateful to Almighty God for our Freedom, in order to secure its blessings, do establish this Constitution.'

We are convinced that this fundamental belief and dependence of the American—always a religious—people is the best security against the dangers of these difficult days. In our opinion, the securing of the peace and safety of our country and our State against such dangers points to the essentiality of teaching our children, as set forth in the Declaration of Independence, that Almighty God is their Creator, and that by Him they have been endowed with their inalienable rights of life, liberty, and the pursuit of happiness" (R. 28).

This awareness of the necessity for recognition in our public educational system of the moral and spiritual values to which the American people have always subscribed was reaffirmed by the Regents in 1955 in their unanimous "Recommendation for School Programs on America's Moral and Spiritual Heritage" (R. 30-39).

"'All men are created equal' is the basic principle of the Brotherhood of Man, and 'endowed by their Creator with life, liberty and the pursuit of happiness' is the recognition of the Fatherhood of God, and that these most precious rights come from the Creator and not from the kings, princes or other men. The proposition that 'government derives its just powers from the consent of the governed' is a recognition of the dignity, worth and sovereignty of each individual under God and of the concept of the individual as a sovereign citizen who, with his fellow citizens, is master of the state they have created and not its servant.

The American people have always been a religious people, believing in God each in accordance with his own conscience. As our Supreme Court well stated, 'We are a religious people whose institutions presuppose a Supreme Being'" (R. 33-34).

After recommending intensive study of the fundamental documents of our Republic, the Regents declared:

> "The same will give to the student an understanding and appreciation of his role as an individual endowed by his Creator with inalienable rights and as a member of a group similarly endowed; of respect for others, particularly parents and teachers, of devotion to freedom and of reverence for Almighty God" (R. 38).

Thus the Regents have sought to impart to the future citizens of the State a recognition of the moral and spiritual values which have been recognized as the basis of our free society since colonial days. The Regents' Prayer, an integral part of that program, serves as a simple reminder that Americans trust in God, as the Pledge of Allegiance serves as a simple reminder of our obligations to our "one nation under God".

It should be emphasized that, in recommending this program, the Regents were not unmindful of the First and Fourteenth Amendments to the United States Constitution, for they specifically cautioned against any injection of sectarianism or formal religion into the public school:

> "In putting such recommendations into effect teachers will be mindful always of the fundamental American doctrine of the separation of church and state, and careful at all times to avoid any and all sectarianism or religious instruction which advocates, teaches or prefers any religious creed. Formal religion is not to be injected into the public school. It is a matter for the church and the home, for the religious leaders and the parents of each child" (R. 32).

There is no evidence in this case that any pupil in the schools operated by respondent School Board has been subjected in the schools to any sectarian or other formal

religious teaching. Undisguised, petitioners' attack is against any voluntary public recognition of belief and trust in God in an effort to obliterate from our public schools any recognition—even on a voluntary basis—of the existence of a Divine Being. In their briefs and arguments below and in their Petition to this Court they attack not merely the Regents' Prayer but any form of prayer whatsoever. They deny to every public school the right to suggest to any child that God is our Creator and the Author of our liberties or to encourage any public expression of gratitude to Him for those liberties, regardless of the wishes of the child or his parents and regardless of the historical and constitutional tradition of this nation.

B. The Nature and Background of This Litigation

On July 8, 1958, respondent School Board, acting in accordance with the Regents' recommendation, adopted a resolution directing that the Regents' Prayer be recited in the schools of the District as a daily procedure to follow the salute to the flag (R. 26, 40, 65-66). On January 22, 1959, petitioners, as interested parents and as taxpayers of the District, commenced a special proceeding under Article 78 of the New York Civil Practice Act* to require the Board to discontinue or cause to be discontinued the recitation of the Prayer in the public schools of the District (R. 9-18).

The sixteen intervenors-respondents are citizens and taxpayers residing within the geographical confines of the School District and are parents of thirty-seven children actually attending the seven district public schools (R. 54).

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* Article 78, entitled "Proceeding against a body or officer", provides a summary procedure for reviewing the acts of public officials and others, codifying and replacing the common-law remedies of mandamus, prohibition and certiorari.

They include members of the Hebrew, Protestant and Catholic faiths, and one (Evelyn Koster) who is a member of no organized church. They were permitted to intervene below on behalf of themselves and other parents in the District, in support of the position of respondent School Board.

It must be emphasized that there is no allegation in the petition for relief under Article 78 (R. 11-18) that any child of any petitioner or any other child in the district was ever compelled, or even urged, to join in the prayer or was ever disciplined or threatened with disciplinary action for failing to do so. Any child whose parents so desire is either excused from the classroom during the recitation of the prayer or permitted to remain silent while the prayer is recited by others (R. 152-54). The answer of respondent School Board (R. 19) and the affidavit of its President (R. 26-27), the opinions below (R. 66) and the affidavit of the School Board President read in support of the Board's motion for a final order of dismissal (R. 151-54) make it plain that no such compulsion was contemplated, or has ever occurred. Petitioners make no claim to the contrary; and throughout their pleadings, as well as in their briefs, their position is clear that the mere institution of the Regents' Prayer—or for that matter any prayer—in the public school system is incurably unconstitutional under any and all circumstances, regardless of the absence of coercion. This position is clearly set forth in the affidavit submitted on behalf of petitioners in opposition to the motion for entry of a final order below (R. 156-57).

Thus, the issue presented in this case is solely one of law and has been so treated by all courts below: Does the Federal Constitution require the abolition of the non-compulsory recital of this non-denominational prayer?

The New York Supreme Court, Special Term (Meyer, J.), in a scholarly and well reasoned opinion, held that the

recognition of prayer is an integral part of our national heritage and that the Establishment Clause cannot have been intended to outlaw the practice in schools any more than in other areas of our public life; that prayer in the schools has been a traditional and accepted practice, particularly at the times of the adoption of the First and Fourteenth Amendments; that these Amendments were not intended to outlaw the practice of public prayer in or out of the schools; that the Regents' Prayer, as a brief, voluntary, non-sectarian acknowledgment of God's existence, was in full accord with this tradition; and, as such, it did not violate either the Federal or State Constitutions (R. 50-116; 18 Misc. 2d 659; opinion annexed to Petition at p. 23).

The order entered upon this determination in Supreme Court, Nassau County (to the extent relevant to appellate proceedings) denied the petition (and accordingly refused to order the discontinuance of the Regents' Prayer), denied petitioners' demand for a jury trial, and directed that the matter be remanded to the respondent Board of Education for proceedings not inconsistent with the Court's opinion (R. 6-8). That opinion in substance directed the Board to adopt certain specific safeguards, confirming its existing practice, to ensure that the recital of the Regents' Prayer was a voluntary matter, to be observed or not at the election of the child or his parents (R. 8, 105-09).

On appeal to the Appellate Division, Second Department, this order was affirmed *per curiam*, one Justice concurring in part and dissenting in part (R. 124-25; 11 App. Div. 2d 340; opinion annexed to Petition at p. 75). A final order was then entered in Supreme Court, Nassau County, dismissing the proceeding on the merits on the ground that respondent School Board had complied with the directions of Special Term, as affirmed (R. 148-49). Petitioners appealed to the Court of Appeals of New York from this final order and, pursuant to Sections 588(2) and 590(a) of the

New York Civil Practice Act, brought up for review in that Court the interlocutory order of the Appellate Division affirming the prior order of Special Term, which determined the merits of the constitutional issues raised by petitioners (R. 145-46).

The Court of Appeals, by a 5 to 2 vote, affirmed the final order and, accordingly, found no error in either the interlocutory or the final order brought up for review. 10 N. Y. 2d 174. That Court first held that there were:

> "• • • adequate provisions to ensure that no pupil need take part in or be present during the act of reverence so any question of 'compulsion' or 'free exercise' is out of the case (see Zorach v. Clauson, 343 U.S. 306) (88)." •

The Court of Appeals further ruled that the recitation of the Prayer was neither "religious education" nor "the practice of or establishment of religion in any reasonable meaning of those phrases" (89), but was in harmony with a "universally accepted tradition" of public prayer in American life. In the majority opinion, Chief Judge Desmond stated:

> "The 'Regents' prayer' is an acknowledgment of our dependence upon Almighty God and a petition for the bestowal of His blessings. It includes an acknowledgment of the existence of a Supreme Being just as does the Declaration of Independence and the Constitutions of each of the 50 States of the Union, including our own. In construing even a Constitution some attention must be paid to the obvious intent of those who drafted it and adopted it (*Matter of Carey* v. *Morton*, 297 N.Y. 361). That the First Amendment was ever intended to forbid as an 'establishment of religion' a simple declara-

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• References to the opinions of the Court of Appeals are to the pages of Appendix A to the Petition herein, where those opinions are reprinted.

tion of belief in God is so contrary to history as to be impossible of acceptance (89).

• • • • •

It is an indisputable and historically provable fact that belief and trust in a Creator has always been regarded as an integral and inseparable part of the fabric of our fundamental institutions. It is not a matter of majority power or minority protection. Belief in a Supreme Being is as essential and permanent a feature of the American governmental system as is freedom of worship, equality under the law and due process of law. Like them it is an American absolute, an application of the natural law beliefs on which the Republic was founded and which in turn presupposes an Omnipotent Being" (91).

Judge Froessel, in his concurring opinion, agreed that the recital of the Regents' Prayer fell within the scope of this Court's decision in *Zorach* v. *Clauson*, 343 U. S. 306, rather than that of *McCollum* v. *Board of Education*, 333 U. S. 203, stating:

"The narrow question presented is: Do the Federal and State Constitutions prohibit the recitation by children in our public schools of the 22 words acknowledging dependence upon Almighty God, and invoking His blessing upon them, their parents and teachers, and upon our country? To say that they do seems to me to stretch the so-called separation of church and State doctrine beyond reason (91).

• • • • •

One may earnestly believe in God, without being attached to any particular religion or church. Hence a rule permitting public school children, willing to do so, to acknowledge their dependence upon Him, and to invoke His blessings, can hardly be called a 'law respecting an establishment of religion' or 'prohibiting the free exercise thereof' in transgression of the First Amendment which in nowise prohibits the recognition of God, or laws respecting such recognition.

The challenged recitation follows the pledge of allegiance, which itself refers to God. School children are permitted to sing 'America', the fourth stanza of which is indeed a prayer, invoking the protection of 'God', 'Author of Liberty'. The preamble to our State Constitution, which is taught in our public schools, provides: 'We the People of the State of New York, grateful to Almighty God for our Freedom'. Virtually every State Constitution in the United States, as well as the Declaration of Independence, contains similar references. To say that such references, and others of like nature employed in the executive, legislative and judicial branches of our Government (*see Zorach* v. *Clauson*, 343 U.S. 306, at pp. 312-313), unrelated to any particular religion or church, may be sanctioned by public officials everywhere but in the public school room defies understanding (92).

• • • • •

Here no partiality is shown, nor are classrooms being turned over to religious instructors as in *McCollum* v. *Board of Educ.* (333 U.S. 203). Any effort of a particular group to promote its own beliefs, doctrines, tenets and dogma must be carried on outside the public school, and any law to the contrary would violate the First Amendment. (*McCollum* v. *Board of Educ., supra.*)

As we see it, then, the challenged recitation was rightly upheld. It is not compulsory, is clearly nonsectarian in language, and neither directly nor indirectly even suggests belief in any form of organized or established religion. It permits each child to express gratitude to God and to invoke His blessing, to be steadfast in the faith of his acceptance if he has one; it compels no one, directly or indirectly, to do anything, if that be his or his parents' wish. All remain free, and thus we do not show preference as between 'those who believe in no religion' and 'those who do believe' (*Zorach* v. *Clauson, supra,* p. 314)" (93).

Judgment on the remittitur was entered in the office of the Clerk of Nassau County on October 23, 1961. A copy of this judgment is annexed as Appendix C, *infra*, at p. 44.

ARGUMENT

POINT I

The decision below, sustaining the constitutionality of the Regents' Prayer, is in harmony with prior rulings of this Court. No review on writ of certiorari is warranted.

Rule 19 of the Rules of this Court provides, so far as here pertinent:

> "A review on writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefor. The following, while neither controlling nor fully measuring the court's discretion, indicate the character of reasons which will be considered:
>
> (a) Where a state court has decided a federal question of substance not theretofore determined by this court, or has decided it in a way probably not in accord with applicable decisions of this court."

While this Court has never specifically ruled on the validity of the Regents' Prayer or any similar public utterance, there are no "special or important reasons" for granting review in this case because:

(1) the voluntary recital of a non-sectarian prayer does not differ in essential principle from the voluntary recital of civic or organic prayers in common use in our schools and in other areas of public life since before the adoption of the Federal Constitution;

(2) such a prayer merely implements, for those who voluntarily recite it, the recognition given by this Court to the fact that " • • • We are a religious people whose institutions presuppose a Supreme Being";

(3) the validity of the Regents' Prayer is established by the principles enunciated by this Court in *Zorach* v. *Clauson*, 343 U.S. 306; *West Virginia State Board of Education* v. *Barnette*, 319 U.S. 624; and *Church of the Holy Trinity* v. *United States*, 143 U.S. 457.

Public utterances of belief in a Supreme Being have long been common in our society. While it would be improper, in this brief in opposition to the Petition, to include a full historical review, some examples may suffice. On June 12, 1775, the Continental Congress proclaimed a day of fasting and prayer, stating:

> "As the great Governor of the World, by his supreme and universal providence, not only conducts the course of nature with unerring wisdom and rectitude, but frequently influences the minds of men to serve the wise and gracious purposes of his providential government; and it being, at all times our indispensable duty devoutly to acknowledge his superintending providence, especially in times of impending danger and public calamity, to reverence and adore his immutable justice as well as to implore His merciful interposition for our deliverance." 2 Journals of the Continental Congress 87.

Similar days of thanksgiving were proclaimed in 1777, 1782 after the victory of the Continental Army, and again in 1783 after the signing of the peace treaty with Great Britain. On the very day that the First Congress approved the First Amendment (September 24, 1789) it resolved:

> "That a joint committee of both Houses be directed to wait upon the President of the United States to request that he would recommend to the people of the United States a day of public thanksgiving and prayer, to be observed by acknowledging, with grateful hearts, the many signal favors of the Almighty God, especially by affording them an opportunity

> peaceably to establish a Constitution of government for their safety and happiness." 1 Annals of Cong. 914-15; *cf.* also *id.* at 90.

The Declaration of Independence, the fountainhead of our national values and a compulsory subject of study in all New York schools (Education Law §3204(3)(2)), asserts that all men:

> "are endowed by their Creator with certain inalienable rights."

and contains at least three other distinct affirmations of belief in God.

The constitutions of New York and of virtually all sister states contain preambles expressing recognition of God's presence and gratitude to Him for our freedom and liberties.* The content of the Regents' Prayer here attacked is merely a paraphrase of some of these constitutional provisions. The phrase used in that Prayer:

"We acknowledge our dependence on Thee" (R. 28) is a paraphrase of the language appearing in the Constitutions of North Carolina and Iowa. The phrase "we beg Thy blessings" is a paraphrase of the invocation for God's blessing and guidance appearing in the Constitutions of Alabama, Illinois, New Jersey and South Carolina.

In very recent years, Congress has repeatedly reaffirmed our national public policy in respect to civic or organic prayer. In 1952 it directed the President to set aside by proclamation a National Day of Prayer (36 U.S.C. §185). In 1954 Congress added the words "under God" to the prescribed Pledge of Allegiance to the Flag (36 U.S.C. §172). The House Report on the basis of which this addi-

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* See Appendix D to this Brief (p. 46) where these preambles are set forth.

tion was made is reprinted as Appendix E to this Brief, *infra*, at p. 58. It is a cogent statement of the principles for which we contend. In 1955 Congress directed that the words of our national motto "In God We Trust" should appear on all of our coins and paper currency (31 U.S.C. §324a). In reality, the Regents' Prayer says no more than does our national motto (36 U.S.C. §186).

These are not meaningless gestures which prove nothing. On the contrary, they exemplify a practice which has existed in our public life since before the adoption of the Federal Constitution and prove that the practice of public prayer is an integral part of our national heritage.

Similarly, Mr. Justice Meyer at Special Term was on sound historical ground when he held that prayer or Bible-reading in public schools was an established and accepted practice at the time of the adoption of the Fourteenth Amendment (R. 73-78) and that there was no indication in the legislative history of either the First or Fourteenth Amendments that all mention of God was to be stricken from our public life, of which our public schools are a part (R. 71-73, 78-80).

Such a meaning would be completely inconsistent with contemporaneous legislation authorizing the President to proclaim a day of public thanksgiving and prayer (1 Annals of Cong. 914-15); appointing chaplains for each House of Congress (2 Annals of Cong. 1519) and for the armed services (1 Stat. 223, 242, 350); and with the Northwest Ordinance of 1787 (adopted in the very year in which the Constitution was drafted, and reenacted verbatim by the First Congress) which provided in part:

> "Religion, morality and knowledge, being necessary to good government and the happiness of mankind, schools and the means of education shall be forever encouraged." 1 Stat. 50-52.

It is in the light of the history of general belief in a Supreme Being that this Court has declared, in *Zorach* v. *Clauson*, 343 U.S. 306, 312-14:

> "The First Amendment, however, does not say that in every and all respects there shall be a separation of Church and State. Rather, it studiously defines the manner, the specific ways, in which there shall be no concert or union or dependency one on the other. That is the common sense of the matter. Otherwise the state and religion would be aliens to each other—hostile, suspicious, and even unfriendly. Churches could not be required to pay even property taxes. Municipalities would not be permitted to render police or fire protection to religious groups. Policemen who helped parishioners into their places of worship would violate the Constitution. Prayers in our legislative halls; the appeals to the Almighty in the messages of the Chief Executive; the proclamations making Thanksgiving Day a holiday; 'so help me God', in our courtroom oaths—these and all other references to the Almighty that run through our laws, our public rituals, our ceremonies would be flouting the First Amendment. A fastidious atheist or agnostic could even object to the supplication with which the Court opens each session: 'God save the United States and this Honorable Court.'
>
> • • • • •
>
> We are a religious people whose institutions presuppose a Supreme Being. We guarantee the freedom to worship as one chooses. We make room for as wide a variety of beliefs and creeds as the spiritual needs of man deem necessary. We sponsor an attitude on the part of government that shows no partiality to any one group and that lets each flourish according to the zeal of its adherents and the appeal of its dogma. When the state encourages religious instruction or cooperates with religious authorities by adjusting the schedule of public events to sectarian needs, it follows the best of our tradition. For it then respects the

> religious nature of our people and accommodates the public service to their spiritual needs."

In so doing, this Court recognized as an historical fact and a present reality the vital force of belief in a Supreme Being as an essential element of our national heritage and existence and followed its decision in *Church of the Holy Trinity* v. *United States*, 143 U.S. 457, where it reviewed the historically religious nature of American institutions from the first settlements through the establishment of the Union and concluded:

> "There is no dissonance in these declarations. There is a universal language pervading them all, having one meaning; they affirm and reaffirm that this is a religious nation. These are not individual sayings, declarations of private persons: they are organic utterances; they speak the voice of the entire people.
>
> • • • • •
>
> If we pass beyond these matters to a view of American life as expressed by its laws, its business, its customs and its society, we find everywhere a clear recognition of the same truth. Among other matters note the following: The form of oath universally prevailing, concluding with an appeal to the Almighty; the custom of opening sessions of all deliberative bodies and most conventions with prayer; the prefatory words of all wills, 'In the name of God, amen;'" 143 U.S. at 470-71.

The Regents' Prayer was recommended in the light of these basic facts of our history and in accordance with the recognition by this Court in *Church of the Holy Trinity* v. *United States*, *supra*, and in *Zorach* v. *Clauson*, *supra*, that "[W]e are a religious people whose institutions presuppose a Supreme Being." It is that respect for the religious nature of our people and that accommodation to

their spiritual needs which the Regents and respondent School Board have here sought conscientiously to accomplish.

Petitioners contend that, because the Regents' Prayer takes place on school premises, its constitutional status must be determined by *McCollum* v. *Board of Education*, 333 U.S. 203. It is submitted that this argument is incorrect. The *McCollum* decision held unconstitutional a program of formal sectarian religious education carried on during regular school hours in the classrooms of the public schools of the City of Champaign, Illinois. That program involved these features:

1. Formal religious instruction in the public schools was the essence of the program.

2. Pupils were segregated for instruction by the school authorities according to their several faiths.

3. School officials supervised and approved the religious teachers.

4. Pupils were solicited for religious instruction on school premises, and registration cards were distributed by the school.

5. Non-attending pupils were isolated or removed to another room.

It is obvious that the program of instruction found unconstitutional in the *McCollum* case differs markedly from the Regents' Prayer at issue in this case. In *McCollum* the core of the program was religious instruction to pupils grouped according to their sectarian preferences or lack of them. To the contrary, the Regents' Prayer, as found at Special Term (R. 112-13) and as stated by Mr. Justice Beldock in the Appellate Division (R. 136) and by Chief Judge Desmond in the opinion of the Court of Appeals (89), is not sectarian instruction of any type but rather

constitutes a simple and voluntary affirmation of belief in and dependence on a Supreme Being in full accord with the heritage and traditions of our people. Thus, the holding of the *McCollum* case is clearly inapplicable to the case at bar.

The weakness of petitioners' position is shown by the decision of this Court in *West Virginia State Board of Education* v. *Barnette*, 319 U.S. 624.

There this Court struck down as unconstitutional a regulation of the State Board of Education which *required* all teachers and pupils in public schools to participate daily in the customary pledge of allegiance to the flag. The complaining parties were Jehovah's Witnesses, who regarded the pledge as an act of idolatry and insisted that compulsory participation in it was contrary to their religious convictions. Under the applicable regulations and statutes, failure to participate in the pledge was declared to be insubordination, dealt with by expulsion. The expelled child could be proceeded against as a delinquent, and his parents or guardians were liable to prosecution (319 U.S. at 629).

The essence of this Court's decision lay in these drastic compulsory factors. This was made plain not only throughout this Court's opinion but also by the opinion of the district court, whose decision was affirmed. That opinion (*Barnette* v. *West Virginia State Board of Education*, 47 F. Supp. 251, 255) concluded:

> "* * * we are clearly of opinion that the regulation of the Board *requiring* that school children salute the flag is void *in so far as it applies to children having conscientious scruples* against giving such salute and that, *as to them*, its enforcement should be enjoined. Injunctive order will issue accordingly" (emphasis supplied).

The injunctive order thus granted, and affirmed on appeal, enjoined the defendants:

> "* * * from requiring the children of the petitioners, or any other children having religious scruples against such action, to salute the flag of the United States, or any other flag, or from expelling such children from school for failure to salute it" (p. 46 of Supreme Court Record in *Barnette* case, No. 591, October Term 1942).

This Court did not, however, rule that the pledge of allegiance should be outlawed for *all* pupils because of the conscientious objections of the minority. Yet that is precisely what petitioners now ask this Court to do with respect to the Regents' Prayer. Respondents and intervenors-respondents have no objection whatever to the entry of an order similar to that entered in the *Barnette* case. Indeed, we believe that the order sought to be reviewed here is indistinguishable from the *Barnette* order in that both fully protect the right of dissenters to abstain from practices which they find objectionable. However, such an order is not what petitioners seek. They ask that the Regents' Prayer—or indeed any prayer—be completely outlawed in our public schools for everyone and under all circumstances. Such a determination would require not only that the Regents' Prayer be discontinued, but also that all schools cease the voluntary recitation of the pledge of allegiance, which, as amended by 36 U.S.C. §172, contains the words "under God". In view of the expressed position of Jehovah's Witnesses that *any* statement of allegiance to a temporal authority is idolatry, the pledge of allegiance, even in its unamended form, could not constitutionally stand, consistent with the views which petitioners ask this Court to accept.

Certainly such results are neither necessary nor desirable as a means of protecting freedom of conscience under the First Amendment. In the words of Mr. Justice Frankfurter's dissent in the *Barnette* case (319 U.S. at 662), any such result would mean:

> "• • • that the consciences of a minority are more sacred and more enshrined in the Constitution than the consciences of a majority."

Indeed, the results for which petitioners contend would, in the name of religious liberty, give to any minority group a veto power over the rights of all others. We reiterate that no one here seeks in any way to attack the beliefs or the rights of petitioners or their children. No one seeks to force petitioners' children to utter a single word, or to do a single act, which is contrary to law or to their own convictions. But petitioners have no right, we insist, to warp our educational system so as to force all others to conform to their views, or to deny to others the right to participate in what they regard as an integral part of our national heritage.

It is therefore submitted that the constitutionality of the Regents' Prayer is properly determined by reference to the principles enunciated in *Zorach* v. *Clauson, supra; Church of the Holy Trinity* v. *United States, supra;* and *West Virginia State Board of Education* v. *Barnette, supra,* and, tested under those principles, there is no substantial federal question warranting review by this Court.

POINT II

Petitioners' failure to invoke properly the jurisdiction of this Court bars any review by this Court.

Petitioners (p. 4 of Petition) have incorrectly invoked the jurisdiction of this Court under 28 U.S.C. §1254 which provides in pertinent part:

> "Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:
>
> (1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree."

It is apparent that this section relates only to judgments of *United States* Courts of Appeals and that any jurisdictional basis for review either on appeal or by writ of certiorari of a judgment of a state court must be based on 28 U.S.C. §1257. That section provides:

> "Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:
>
> (1) By appeal, where is drawn in question the validity of a treaty or statute of the United States and the decision is against its validity.
>
> (2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity.
>
> (3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the

> United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States."

It is the position of respondents and intervenors-respondents that, under the express provisions of this section, this case can only be reviewed in this Court on appeal pursuant to subsection (2); and that any petition for writ of certiorari under subsection (3) is improper.

There is no doubt that petitioners "drew into question" in the New York courts the validity of the resolution of the respondent School Board dated July 8, 1958 on the ground that it was repugnant to the Constitution of the United States. It must also be conceded that the final determination of the Court of Appeals of New York, the highest state court in which a decision could be had, was in favor of the validity of that resolution. That resolution is, for purposes of 28 U.S.C. §1257, a state "statute" inasmuch as it is an enactment "to which a state gives the force of law". See *Hamilton* v. *Regents of the University of California*, 293 U.S. 245; *King Mfg. Co.* v. *Augusta*, 277 U.S. 100; *Williams* v. *Bruffy*, 96 U.S. 176; *cf. McCollum* v. *Board of Education*, 333 U.S. 203.

When a case has been decided by a state court of last resort in the manner specified in 28 U.S.C. §1257(2), it is submitted that review may be had only under that subsection; and that review by writ of certiorari under 28 U.S.C. §1257(3) is available only where the specific requirements of the prior subsection cannot be satisfied. Any other construction would render meaningless the basic distinction between appeal and certiorari in the statutory appellate jurisdiction of the Court.

Congress has provided that an *appeal* improvidently taken may be regarded and acted on as a petition for writ of certiorari, see 28 U.S.C. §2103. Here petitioners have proceeded on the basis of certiorari and there is no similar statutory saving provision with respect to erroneously filed petitions for writ of certiorari. Petitioners have not filed any notice of appeal within the prescribed period, see 28 U.S.C. §2101(c), and their time to file such a notice may not be extended. It is therefore submitted that the Petition herein should be dismissed on the ground that review lies only by appeal and that no notice of appeal has been timely filed.

Even assuming *arguendo* that this construction of 28 U.S.C. §1257 is incorrect, petitioners have invoked the jurisdiction of this Court under 28 U.S.C. §1254—a patently unavailable source of jurisdiction. They have therefore failed to seek review properly within the time allowed for filing such petitions. Not having obtained any extension of time to file a proper petition, review in this Court on certiorari is foreclosed.

CONCLUSION

Because the federal question here presented was properly decided by the New York courts in accordance with long-standing tradition and this Court's prior decisions, and because petitioners have failed to invoke the jurisdiction of this Court properly within the time allowed by law, the Petition should be denied.

Respectfully submitted,

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Dated: New York, New York
November 21, 1961

APPENDIX A

(a) United States Constitution, First Amendment

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

(b) United States Constitution, Fourteenth Amendment, Section 1

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

(c) United States Code, Title 28, Section 1254

"Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

(2) By appeal by a party relying on a State statute held by a court of appeals to be invalid as repugnant to the Constitution, treaties or laws of the United States, but such appeal shall preclude review by writ of certiorari at the instance of such appellant, and the review on appeal shall be restricted to the Federal questions presented;

(3) By certification at any time by a court of appeals of any question of law in any civil or criminal

case as to which instructions are desired, and upon such certification the Supreme Court may give binding instructions or require the entire record to be sent up for decision of the entire matter in controversy."

(d) United States Code, Title 28, Section 1257

"Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

(1) By appeal, where is drawn in question the validity of a treaty or statute of the United States and the decision is against its validity.

(2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity.

(3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States."

(e) United States Code, Title 28, Section 2101(c)

"Any other appeal or any writ of certiorari intended to bring any judgment or decree in a civil action, suit or proceeding before the Supreme Court for review shall be taken or applied for within ninety days after the entry of such judgment or decree. A justice of the Supreme Court, for good cause shown, may extend the time for applying for a writ of certiorari for a period not exceeding sixty days."

(f) United States Code, Title 28, Section 2103

"If an appeal to the Supreme Court is improvidently taken from the decision of the highest court of a State in a case where the proper mode of a review is by petition for certiorari, this alone shall not be ground for dismissal; but the papers whereon the appeal was taken shall be regarded and acted on as a petition for writ of certiorari and as if duly presented to the Supreme Court at the time the appeal was taken. Where in such a case there appears to be no reasonable ground for granting a petition for writ of certiorari it shall be competent for the Supreme Court to adjudge to the respondent reasonable damages for his delay, and single or double costs."

(g) Resolution of Respondent Board of Education of Union Free School District Number 9, New Hyde Park, New York, dated July 8, 1958

BOARD OF EDUCATION

Union Free School District No. 9
Town of North Hempstead
New Hyde Park, L. I., N. Y.

PIoneer 2-7800

Certified Extract From
Minutes of Board of Education,
Union Free School District No. Nine

of

Meeting of July 8, 1958.

• • • • •

'Mrs. Harte moved, seconded by Mr. Saunders, that the regents prayer be said daily in our schools. Motion carried by majority vote, Mr. Fried voted "nay". The Board of Education gave direction to the District Principal that this be instituted as a daily procedure to follow the Salute to the flag.'

• • • • •

I, Florence Alnwick, District Clerk of Union Free School District No. Nine, Do Hereby Certify that the foregoing is a true and correct copy of an extract from the minutes of a meeting of the Board of Education duly called and held on July eighth, nineteen hundred and fifty-eight, at which a quorum was present and acting throughout.

I Do Hereby Further Certify that said resolution has not been rescinded or revoked.

In witness whereof I have hereto set my hand under seal of District No. Nine, this date of February thirteenth, nineteen hundred and fifty-nine.

Florence Alnwick
Florence Alnwick
District Clerk

Seal of the
District

APPENDIX B

THE UNIVERSITY OF THE STATE OF NEW YORK
THE STATE EDUCATION DEPARTMENT
Albany

THE REGENTS STATEMENT ON MORAL AND SPIRITUAL TRAINING IN THE SCHOOLS

BELIEF IN and dependence upon Almighty God was the very cornerstone upon which our Founding Fathers builded.

Our State Constitution opens with these solemn words: "We, the People of the State of New York, grateful to Almighty God for our Freedom, in order to secure its blessings, do establish this Constitution."

We are convinced that this fundamental belief and dependence of the American—always a religious—people is the best security against the dangers of these difficult days. In our opinion, the securing of the peace and safety of our country and our State against such dangers points to the essentiality of teaching our children, as set forth in the Declaration of Independence, that Almighty God is their Creator, and that by Him they have been endowed with their inalienable rights of life, liberty, and the pursuit of happiness.

We believe that at the commencement of each school day the act of allegiance to the Flag might well be joined with this act of reverence to God: "Almighty God, we acknowledge our dependence upon Thee, and we beg Thy blessings upon us, our parents, our teachers and our Country."

We believe that the school day thus started might well include specific programs stressing the moral and spiritual heritage which is America's, the trust which our pioneering ancestors placed in Almighty God, their gratitude to Him

from Whom they freely and frequently acknowledged came their blessings and their freedom and their abiding belief in the free way of life and in the universal brotherhood of man based upon their acknowledgment of the fatherhood of their Creator, Almighty God, Whom they loved and reverenced in diverse ways.

We believe that thus constantly confronted with the basic truth of their existence and inspired by the example of their ancestors, our children will find all their studies brought into focus and accord, respect for lawful authority and obedience to law will be the natural concomitant of their growth, and each of them will be properly prepared to follow the faith of his or her father, as he or she receives the same at mother's knee, by father's side, and as such faith is expounded and strengthened for them by his or her religious leaders.

We believe that thus the school will fulfill its high function of supplementing the training of the home, ever intensifying in the child that love for God, for parents and for home which is the mark of true character training and the sure guarantee of a country's welfare.

We believe that such is the best way of insuring that this Government and our way of life shall not perish from the earth.

We believe that this Statement will be subscribed to by all men and women of good will, and we call upon all of them to aid in giving life to our program.

The foregoing statement of belief was unanimously adopted by the State Board of Regents at its regular meeting on November 30, 1951.

The REGENTS' RECOMMENDATIONS
for SCHOOL PROGRAMS on
AMERICA'S MORAL & SPIRITUAL
HERITAGE

THE REGENTS' RECOMMENDATIONS FOR SCHOOL PROGRAMS ON *AMERICA'S MORAL & SPIRITUAL HERITAGE*

Unanimously Adopted *by the* Regents
March 25, 1955

THE UNIVERSITY OF THE STATE OF NEW YORK
The State Education Department
Albany

1955

THE UNIVERSITY OF THE STATE OF NEW YORK

Regents of the University

WILLIAM J. WALLIN, A.M., LL.D., *Chancellor Emeritus*, Yonkers

JOHN P. MYERS, A.B., D.Sc., LL.D., D.Eng., *Chancellor*, Plattsburgh

EDWARD R. EASTMAN, LL.D., Litt.D., *Vice Chancellor*, Ithaca

WELLES V. MOOT, A.B., LL.B., LL.D., Buffalo

MRS. CAROLINE WERNER GANNETT, L.H.D., LL.D., Rochester

ROGER W. STRAUS, Litt.B., LL.D., L.H.D., D.H.L., New York

DOMINICK F. MAURILLO, A.B., M.D., LL.D., Brooklyn

JOHN F. BROSNAN, A.M., LL.B., J.D., LL.D., D.C.L., New York

JACOB L. HOLTZMANN, LL.B., LL.D., D.C.L., New York

EDGAR W. COUPER, A.B., LL.D., Binghamton

ALEXANDER J. ALLAN, JR., LL.D., Litt.D., Troy

THAD L. COLLUM, C.E., Syracuse

GEORGE L. HUBBELL, JR., A.B., LL.B, New York

AMERICA'S MORAL & SPIRITUAL HERITAGE

On November 30, 1951, the Regents issued their Statement on Moral and Spiritual Training in the Schools, which opened with these words: "Belief in and dependence upon Almighty God was the very cornerstone upon which our Founding Fathers builded."

In such Statement, the Regents expressed their convictions that such fundamental belief and dependence is the best security against the dangers of these difficult days and the adoption of their recommendations the best way of insuring that this Government and our way of life shall not perish from the earth.

Such Statement contemplated the issuance of a Supplemental Statement setting forth the Regents' recommendations for programs in the schools stressing the Moral and Spiritual Heritage of America. This is the Supplemental Statement.

In putting such recommendations into effect teachers will be mindful always of the fundamental American doctrine of the separation of church and state, and careful at all times to avoid any and all sectarianism or religious instruction which advocates, teaches or prefers any religious creed. Formal religion is not to be injected into the public school. It is a matter for the church and the home, for the religious leaders and the parents of each child.

FUNDAMENTAL BELIEFS

LIBERTY UNDER GOD • RESPECT FOR THE DIGNITY & RIGHTS OF EACH INDIVIDUAL • DEVOTION TO FREEDOM

The Brotherhood of Man under the Fatherhood of God

Our Founding Fathers set forth in the Declaration of Independence, with unequaled clarity and simplicity, the fundamental moral and spiritual ideals of this Nation:

> *We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness. That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed. . . .*

"All men are created equal" is the basic principle of the Brotherhood of Man, and "endowed by their Creator with life, liberty and the pursuit of happiness" is the recognition of the Fatherhood of God, and that these most precious rights come from the Creator and not from the kings, princes or other men. The proposition that "government derives its just powers from the consent of the governed" is a recognition of the dignity, worth and sovereignty of each individual under God and of the concept of the individual as a sovereign citizen who, with his fellow citizens, is master of the state they have created and not its servant.

The American people have always been a religious people, believing in God each in accordance with his own conscience. As our Supreme Court well stated, "We are a religious people whose institutions presuppose a Supreme Being."

The Constitution of the State of New York opens with these solemn words: "We, the People of the State of

New York, grateful to Almighty God for our Freedom, in order to secure its blessings, do establish this Constitution."

The Great Seal of the United States has as its symbol for future generations an unfinished pyramid of thirteen steps, representing the thirteen colonies, which pyramid is placed under the eye of God, and the motto, "Annuit Coeptis," meaning "He Has Favored Our Undertaking." This motto is repeated on every dollar bill, and our common coins and stamps carry the words, "In God We Trust."

Our Presidents and other great leaders again and again have recalled to our people their dependence upon Almighty God and their obligations to their fellow men, and the necessity of vigilantly protecting their liberty and their freedom. From the countless stream of quotations we cull the following:

At the Constitutional Convention in Philadelphia, Washington, as Chairman, set the spiritual tone for the sessions when he said: "Let us raise a standard to which the wise and honest can repair. The event is in the hand of God."

When the delegates at the Convention seemed hopelessly in disagreement, Benjamin Franklin, "imploring the assistance of Heaven," said, "I have lived, Sir, a long time, and the longer I live, the more convincing proofs I see of this truth—that God Governs in the affairs of men."

* * * * *

Washington, in taking his oath of office at his First Inaugural, said:

> *No people can be bound to acknowledge and adore the Invisible Hand which conducts the affairs of men more than those of the United States. Every step by which they have advanced to the character of an independent nation seems to have been distinguished by some token of providential agency; and in the important revolution just accomplished and in the system of their united government the tranquil deliber-*

ations and voluntary consent of so many distinct communities from which the event has resulted can not be compared with the means by which most governments have been established without some return of pious gratitude, along with an humble anticipation of the future blessings which the past seems to presage. . . .

• • • • •

Again, in his Farewell Address, Washington puts his convictions into these enduring words: "Of all the dispositions and habits which lead to political prosperity, religion and morality are indispensable supports. . . . reason and experience both forbid us to expect that national morality can prevail in exclusion of religious principle."

• • • • •

Abraham Lincoln at Gettysburg said:

Four score and seven years ago our fathers brought forth on this continent, a new nation, conceived in Liberty, and dedicated to the proposition that all men are created equal.

He added that our soldiers fought and died there so "that this nation, under God, shall have a new birth of freedom—and that government of the people, by the people, for the people, shall not perish from the earth."

• • • • •

In another address these were his words:

Our reliance is in the love of liberty which God has planted in us. Our defense is in the spirit which prized liberty as the heritage of all men, in all lands everywhere. Destroy this spirit and you have planted the seeds of despotism at your own doors.

• • • • •

And in one of his last public speeches he uttered the sublime thought:

> *With malice toward none, with charity for all, with firmness in the right as God gives us to see the right, let us strive on to finish the work we are in, to bind up the nation's wounds, . . . to do all which may achieve and cherish a just and lasting peace among ourselves and with all nations.*

• • • • •

In all these expressions Lincoln put into words the spiritual motivations for the sacrifices made not only by the heroes of Gettysburg and the other battles of the Civil War, but also of all Americans who have gone into battle, whether at Lexington, San Juan Hill, the Argonne Forest, Iwo Jima or Heartbreak Ridge.

• • • • •

Woodrow Wilson, in urging the American people to extend the principles of the Founders of this Republic into the realm of world leadership, said: "I summon all honest men, all patriotic, all forward-looking men to my side. God helping me, I will not fail them, if they will but counsel and sustain me!"

Finally, President Eisenhower brings our national moral and spiritual ideals down to date in these words: "Without God there could be no American form of government, nor an American way of life. . . . Thus the Founding Fathers saw it; and thus, with God's help, it will continue to be. . . . The path we travel is narrow and long—beset with many dangers. Each day we must ask that Almighty God will set and keep His protecting hand over us so that we may pass on to those who come after us the heritage of a free people, secure in their God-given right and in full control of a government dedicated to the preservation of those rights."

Throughout our entire history as a Nation, these Fundamental Beliefs have been our moral and spiritual ideals, our guiding star and our compass in time of storm and trouble. They should be a living part of the lives of all our children.

• • • • •

Devotion to Freedom

How well this is expressed in these challenging words of Thomas Jefferson: "I have sworn upon the altar of God, eternal hostility against every form of tyranny over the mind of man."

Our freedom of speech and worship and of the press, and to do all things which do not harm others, are highly important, but of even greater importance is the desire and will of the people to have them and to preserve them. The only way for freedom-loving people to secure the "blessings of liberty to ourselves and our posterity" is eternal vigilance through actions that are in response to the Moral Law. In the words of the Chancellor of the Board of Regents, opening our 1953 Convocation, "Freedom is not free—it must constantly be defended and cared for lest we lose it. That is the price we pay for it. We must reinterpret for our children the initiative, the courage and the faith of the Founding Fathers. We must root deeply in their hearts faith in the unimpeachable dignity of the individual and in the unquenchable spirit of free man."

Stressing Moral & Spiritual Values

We recommend:

First: That periods be set aside at frequent intervals during the school year which will be devoted to the intensive study of the foregoing fundamental and great American documents and pronouncements. The same will give to

the student an understanding and appreciation of his role as an individual endowed by his Creator with inalienable rights and as a member of a group similarly endowed; of respect for others, particularly parents and teachers, of devotion to freedom and of reverence for Almighty God. Thus, as we heretofore stated, "the school will fulfill its high function of supplementing the training of the home, ever intensifying in the child that love for God, for parents and for home which is the mark of true character training and the sure guarantee of a country's welfare."

• • • • •

Second: The development of moral and spiritual values through all the activities and lessons of the school day and particularly by the good example of the school staff. For instance, sports and games may be used to build a sense of fair play, a willingness to lose a game rather than cheat, a desire to do to others as you would be done by and of striving to build a healthy mind and body. The study of science will develop honest dealing with facts, an open mind for new ideas and a keen alertness for the views and experiences of others, respect for truth and humility as one contemplates the vastness of space, the minuteness of the atom and the reign of law and order in the Universe. Biography will keep before pupils inspired examples of character, and encourage them with "the habitual vision of greatness." Friendship among pupils of interracial groups will constitute a strong bulwark against prejudice and intolerance.

Thus our children, inspired by the example of their ancestors, guided by the faith and love of their parents and encouraged by their spiritually sensitive teachers, will renew in their daily lives America's Moral and Spiritual Heritage:

LIBERTY UNDER GOD • RESPECT FOR THE DIGNITY & RIGHTS OF EACH INDIVIDUAL • DEVOTION TO FREEDOM

APPENDIX C

At a Special Term Part II of the Supreme Court held in and for the County of Nassau, at the Court House in Mineola, New York, on the 23rd day of October, 1961 at 33 Willis Ave., Mineola, N. Y.

PRESENT:

HON. MARIO PITTONI,

Justice.

#1824/1959

In the Matter of the Application of

STEVEN I. ENGEL, DANIEL LICHTENSTEIN, MONROE LERNER, LENORE LYONS and LAWRENCE ROTH,

Petitioners-Appellants,

—against—

WILLIAM J. VITALE, JR., PHILIP J. FREED, MARY HARTE, ANNE BIRCH and RICHARD SAUNDERS, constituting the Board of Education of Union Free School District Number Nine, New Hyde Park, New York,

Respondents-Respondents,

directing them to discontinue a certain school practice

and

HENRY HOLLENBERG, ROSE LEVINE, MARTIN ABRAMS, HELEN SWANSON, WALTER F. GIBB, JANE EHLEN, RALPH B. WEBB, VIRGINIA ZIMMERMAN, VIRGINIA DAVIS, VIOLET S. COX, EVELYN KOSTER, IRENE O'ROURKE, ROSMARIE PETELENZ, DANIEL J. REEHIL, THOMAS DELANEY and EDWARD L. MACFARLANE,

Intervenor-Respondents-Respondents.

The above named Petitioners-Appellants, having appealed to the Court of Appeals from the final order of the Supreme Court of the State of New York, County of Nassau, entered in the Office of the Clerk of the County of Nassau on the 17th day of March, 1961; and from an interlocutory order of the Appellate Division of the Supreme Court, Second Department, entered in the office of the Clerk of that court on October 17, 1960, affirming the interlocutory order herein of the Supreme Court, County of Nassau, entered in the Office of the Clerk of the County of Nassau on October 5, 1959; and the Court of Appeals having heard said appeal and ordered and adjudged that the order so appealed from be affirmed without costs, and the remittitur of the Court of Appeals having been duly filed in the Office of the Clerk of the County of Nassau on the 19th day of July, 1961;

Now on reading and filing the remittitur from the said Court of Appeals herein, and on motion of Gunn, Neier & Daiker, attorneys for the Respondents herein, it is

ORDERED AND ADJUDGED, that the order and judgment of said Court of Appeals be and the same hereby is made the order and judgment of this Court, without costs.

ENTER,

MARIO PITTONI
J.S.C.

Granted: October 23, 1961 Entered: October 23, 1961
FRANCIS J. ANDERSON
County Clerk of Nassau County

APPENDIX D

The State Constitutions or Preambles thereto of 49 States of the United States acknowledge that the rights and liberties of the people issue from God and express gratefulness therefor.

Alabama (Adopted in 1901)

We, the people of the State of Alabama, in order to establish justice, insure domestic tranquility and secure the blessings of liberty to ourselves and our posterity, invoking the favor and guidance of Almighty God, do ordain and establish the following Constitution and form of government for the State of Alabama. 1 Ala. Code 3 (1960).

Alaska (Adopted April 24, 1956)

We the people of Alaska, grateful to God and to those who founded our nation and pioneered this great land, in order to secure and transmit to succeeding generations our heritage of political, civil, and religious liberty within the Union of States, do ordain and establish this Constitution for the State of Alaska. Session Laws of Alaska 4 (1959).

Arizona (Adopted in 1912)

We, the people of the State of Arizona, grateful to Almighty God for our liberties, do ordain this Constitution. 1 Ariz. Rev. Stat. 192 (1956).

Arkansas (Adopted in 1874)

We, the people of the State of Arkansas, grateful to Almighty God for the privilege of choosing our own form of government, for our civil and religious liberty, and desiring to perpetuate its blessings and secure the same to ourselves and posterity, do ordain and establish this Constitution. 1 Ark. Stat. 23 (1947).

California (Adopted in 1879)

We, the people of the State of California, grateful to Almighty God for our freedom, in order to secure and perpetuate its blessings, do establish this Constitution. Calif. Const. 1 (Mason 1953).

Colorado (Adopted in 1876)

We, the people of Colorado, with profound reverence for the Supreme Ruler of the Universe, in order to form a more independent and perfect government; establish justice; insure tranquillity; provide for the common defense; promote the general welfare and secure the blessings of liberty to ourselves and our posterity; do ordain and establish this Constitution for the "State of Colorado". 1 Colo. Rev. Stat. 245 (1953).

Connecticut (Adopted in 1818)

The People of Connecticut acknowledging with gratitude, the good providence of God, in having permitted them to enjoy a free government; do, in order more effectually to define, secure, and perpetuate the liberties, rights and privileges which they have derived from their ancestors; hereby, after a careful consideration and revision, ordain and establish the following constitution and form of civil government. 1 Conn. Gen. Stat. 32 (1958).

Delaware (Adopted in 1897)

Through Divine goodness, all men have by nature the rights of worshiping and serving their Creator according to the dictates of their consciences, of enjoying and defending life and liberty, of acquiring and protecting reputation and property, and in general of obtaining objects suitable to their condition, without injury by one to another; and as these rights are essential to their welfare, for due exercise thereof, power is inherent in them; and therefore

all just authority in the institutions of political society is derived from the people, and established with their consent, to advance their happiness; and they may for this end, as circumstances require, from time to time, alter their Constitution of government. 1 Del. Code Ann. 147 (1953).

Florida (Adopted in 1885)

We, the people of the State of Florida, grateful to Almighty God for our constitutional liberty, in order to secure its blessings and to form a more perfect government, insureing domestic tranquillity, maintaining public order and guaranteeing equal civil and political rights to all, do ordain and establish this constitution. 3 Fla. Stat. 3379 (1959).

Georgia (Adopted in 1887)

To perpetuate the principles of free government, insure justice to all, preserve peace, promote the interest and happiness of the citizen, and transmit to posterity the enjoyment of liberty, we, the people of Georgia, relying upon the protection and guidance of Almighty God, do ordain and establish this Constitution. 2 Ga. Code Ann. 221 (1948).

Hawaii (Adopted in 1959)

We, the people of the State of Hawaii, grateful for Divine Guidance, and mindful of our Hawaiian heritage, reaffirm our belief in a government of the people, by the people and for the people, and with an understanding heart toward all the peoples of the earth, do hereby ordain and establish this Constitution for the State of Hawaii. Session Laws of Hawaii 85 (1959).

Idaho (Adopted in 1890)

We, the people of the State of Idaho, grateful to Almighty God for our freedom, to secure its blessings and promote our common welfare do establish this Constitution. 1 Idaho Code 43 (1949).

Illinois (Adopted in 1870)

We, the people of the state of Illinois—grateful to Almighty God for the civil, political and religious liberty which He hath so long permitted us to enjoy, and looking to Him for a blessing upon our endeavors to secure and transmit the same unimpaired to succeeding generations—in order to form a more perfect government, establish justice, insure domestic tranquillity, provide for the common defense, promote the general welfare, and secure the blessing of liberty to ourselves and our posterity, do ordain and establish this constitution for the state of Illinois. Ill. Ann. Stat., Const. 158 (1936).

Indiana (Adopted in 1851)

To the end, that justice be established, public order maintained, and liberty perpetuated: We, the People of the State of Indiana, grateful to Almighty God for the free exercise of the right to choose our own form of government, do ordain this Constitution. 1 Ind. Stat. Ann. 1 (1955).

Iowa (Adopted in 1857)

We, the People of the State of Iowa, grateful to the Supreme Being for the blessings hitherto enjoyed, and feeling our dependence on Him for a continuation of those blessings, do ordain and establish a free and independent government, by the name of the State of Iowa, the boundaries whereof shall be as follows: 1 Iowa Code lxxi (1958).

Kansas (Adopted in 1859)

We, the people of Kansas, grateful to Almighty God for our civil and religious privileges, in order to insure the full enjoyment of our rights as American citizens, do ordain and establish this Constitution of the state of Kansas, with the following boundaries. . . . Kan. Gen. Stat. xxxviii (1949).

Kentucky (Adopted in 1891)

We, the people of the Commonwealth of Kentucky, grateful to Almighty God for the civil, political and religious liberties we enjoy, and invoking the continuance of these blessings, do ordain and establish this Constitution. Ky. Rev. Stat. 1 (1955).

Louisiana (Adopted in 1921)

We, the people of the State of Louisiana, grateful to Almighty God for the civil, political and religious liberties we enjoy, and desiring to secure the continuance of these blessings, do ordain and establish this Constitution. 1 La. Stat. Ann. 5 (West 1954).

Maine (Adopted in 1820 and 1876)

We the people of Maine, in order to establish justice, insure tranquillity, provide for our mutual defence, promote our common welfare, and secure to ourselves and our posterity the blessings of liberty, acknowledging with grateful hearts the goodness of the Sovereign Ruler of the Universe in affording us an opportunity, so favorable to the design; and, imploring His aid and direction in its accomplishment, do agree to form ourselves into a free and independent State, by the style and title of the STATE OF MAINE, and do ordain and establish the following Constitution for the government of the same. 1 Me. Rev. Stat. xxxi (1954).

Maryland (Adopted in 1867)

We, the People of the State of Maryland, grateful to Almighty God for our civil and religious liberty, and taking into our serious consideration for best means of establishing a good Constitution in this State for the sure foundation and more permanent security thereof, declare: 9 Md. Code Ann. 20 (1957).

Massachusetts (Adopted in 1790)

We, therefore, the people of Massachusetts, acknowledging, with grateful hearts, the goodness of the great Legislator of the universe, in affording us, in the course of His providence, an opportunity, deliberately and peaceably, without fraud, violence or surprise, of entering into an original, explicit, and solemn compact with each other; and for forming a new constitution of civil government, for ourselves and posterity; and devoutly imploring His direction in so interesting a design, do agree upon, ordain, and establish the following Declaration of Rights, and Frame of Government, as the CONSTITUTION OF THE COMMONWEALTH OF MASSACHUSETTS. 10 Mass. Ann. Laws 5 (1951).

Michigan (Adopted in 1909)

We, the people of the State of Michigan, grateful to Almighty God for the blessings of freedom, and earnestly desiring to secure these blessings undiminished to ourselves and our posterity, do ordain and establish the Constitution. 1 Mich. Stat. Ann. 203 (1936).

Minnesota (Adopted in 1857)

We, the people of the State of Minnesota, grateful to God for our civil and religious liberty and desiring to perpetuate its blessings and secure the same to ourselves and our posterity, do ordain and establish this Constitution. 1 Minn. Stat. 31 (1953).

Mississippi (Adopted in 1890)

We, the people of Mississippi in convention assembled, grateful to Almighty God, and invoking his blessing on our work, do ordain and establish this constitution. 1 Miss. Code Ann. 133 (Recomp. 1956).

Missouri (Adopted in 1945)

We, the people of Missouri, with profound reverence for the Supreme Ruler of the Universe, and grateful for His goodness, do establish this constitution for the better government of the state. Mo. Rev. Stat. 41 (1949).

Montana (Adopted in 1889)

We, the people of Montana, grateful to Almighty God for the blessings of liberty, in order to secure the advantages of a state government, do, in accordance with the provisions of the enabling act of congress, approved the twenty-second of February, A. D. 1889, ordain and establish this constitution. 1 Mont. Rev. Code 83 (1947).

Nebraska (Adopted in 1875)

We, the people, grateful to Almighty God for our freedom, do ordain and establish the following declaration of rights and frame of government, as the Constitution of the State of Nebraska. Neb. Laws, 71st Session 11 (1960).

Nevada (Adopted in 1864)

We the people of the State of Nevada Grateful to Almighty God for our freedom in order to secure its blessings, insure domestic tranquillity, and form a more perfect Government, do establish this CONSTITUTION. 5 Nev. Rev. Stat. (1960).

New Hampshire, Articles 4th and 5th (Adopted in 1784)

Every individual has a natural and unalienable right to worship God according to the dictates of his own conscience, and reason . . . morality and piety, rightly grounded on evangelical principles, will give the best and greatest security to government, and will lay, in the hearts of men, the strongest obligations to due subjection; and as the knowl-

edge of these is most likely to be propagated through society by the institution of the public worship of the Deity . . . N. H. Rev. Stat. 49-50 (1955).

New Jersey (Adopted in 1947)

We, the people of the State of New Jersey, grateful to Almighty God for the civil and religious liberty which He has so long permitted us to enjoy, and looking to Him for a blessing upon our endeavors to secure and transmit the same unimpaired to succeeding generations, do ordain and establish this Constitution. N. J. S. A. Constitution 2 (1954).

New Mexico (Adopted in 1911)

We, the people of New Mexico, grateful to Almighty God for the blessings of liberty, in order to secure the advantages of a state government, do ordain and establish this Constitution. 1 N. M. Stat. 59 (1953).

New York (Adopted in 1895)

We, the people of the State of New York, grateful to Almighty God for our Freedom, in order to secure its blessings, do establish this Constitution. N. Y. Const., Part I, p. 177 (McKinney 1954).

North Carolina (Adopted in 1876)

We, the people of the State of North Carolina, grateful to Almighty God, and the Sovereign ruler of nations, for the preservation of the American Union and the existence of our civil, political and religious liberties, and acknowledging our dependence upon Him for the continuance of those blessings to us and our posterity, do, for the more certain security thereof, and for the better government of this State, ordain and establish this Constitution. 4A N. C. Gen. Stat. 5 (1955).

North Dakota (Adopted in 1889)

We, the people of North Dakota, grateful to Almighty God for the blessings of civil and religious liberty, do ordain and establish this constitution. 13 N. D. Code Ann. 101 (1960).

Ohio (Adopted in 1851)

We, the people of the State of Ohio, grateful to Almighty God for our freedom, to secure its blessings and promote our common welfare, do establish this Constitution. Ohio Rev. Code Ann., Appendix 345 (Page 1955).

Oklahoma (Adopted in 1907)

Invoking the guidance of Almighty God in order to secure and perpetuate the blessing of liberty; to secure just and rightful government; to promote our mutual welfare and happiness, we the people of the State of Oklahoma, do ordain and establish this Constitution. 1 Okla. Stat. '43 (1951).

Oregon (Adopted in 1859)

All men shall be secured in the Natural right, to worship Almighty God according to the dictates of their own consciences. Ore. Const., art. I, §2.

Pennsylvania (Adopted in 1874)

We, the people of the Commonwealth of Pennsylvania, grateful to Almighty God for the blessings of civil and religious liberty, and humbly invoking His guidance, do ordain and establish this Constitution. Penna. Const. 95 (Purdon 1930).

Rhode Island (Adopted in 1843)

We, the people of the state of Rhode Island and Providence Plantations, grateful to Almighty God for the civil

and religious liberty which He hath so long permitted us to enjoy, and looking to Him for a blessing upon our endeavors to secure and to transmit the same unimpaired to succeeding generations do ordain and establish this Constitution of government. 1 R. I. Gen. Laws 137 (1956).

South Carolina (Adopted in 1895)

We, the people of the State of South Carolina, in Convention assembled, grateful to God for our liberties, do ordain and establish this Constitution for the preservation and perpetuation of the same. 7 S. C. Code 81 (1952).

South Dakota (Adopted in 1889)

We, the people of South Dakota, grateful to Almighty God for our civil and religious liberties, in order to form a more perfect and independent government, establish justice, insure tranquillity, provide for the common defense, promote the general welfare and preserve to ourselves and to our posterity the blessings of liberty, do ordain and establish this constitution for the state of South Dakota. 2 S. D. Code 51 (1939).

Tennessee (Adopted in 1870)

That all men have a natural and indefeasible right to worship Almighty God according to the dictates of their own conscience; that no man can of right, be compelled to attend, erect or support any place of worship, or to maintain any minister against his consent; that no human authority can, in any case whatever, control or interfere with the rights of conscience; and that no preference shall ever be given, by law, to any religious establishment or mode of worship. Tenn. Const., art. I, §3.

Texas (Adopted in 1876)

Humbly invoking the blessings of Almighty God, the people of the State of Texas, do ordain and establish this Constitution. 1 Texas Const. 2 (Vernon 1955).

Utah (Adopted in 1895)

Grateful to Almighty God for life and liberty, we, the people of Utah, in order to secure and perpetuate the principles of free government, do ordain and establish this CONSTITUTION. 1 Utah Code Ann. 138 (1953).

Vermont (Adopted in 1793)

That all men have a natural and unalienable right, to worship Almighty God, according to the dictates of their own consciences and understandings, as in their opinion shall be regulated by the word of God; and that no man ought to, or of right can be compelled to attend any religious worship, or erect or support any place of worship, or maintain any minister, contrary to the dictates of his conscience, nor can any man be justly deprived or abridged of any civil right as a citizen, on account of his religious sentiments, or peculiar mode of religious worship; and that no authority can, or ought to be vested in, or assumed by, any power whatever, that shall in any case interfere with, or in any manner control the rights of conscience, in the free exercise of religious worship. Nevertheless, every sect or denomination of christians ought to observe the sabbath or Lord's day, and keep up some sort of religious worship, which to them shall seem most agreeable to the revealed will of God. Vermont Const., ch. I, art. 3.

Virginia (Adopted in 1902)

That religion or the duty which we owe to our creator, and the manner of discharging it, can be directed only by

reason and conviction, not by force or violence and, therefore, all men are equally entitled to the free exercise of religion, according to the dictates of conscience and that it is the mutual duty of all to practice Christian forbearance, love and charity towards each other. Va. Const., art. I, §16.

Washington (Adopted in 1889)

We, the people of the State of Washington, grateful to the Supreme Ruler of the Universe for our liberties, do ordain this constitution. Vol. 0 Wash. Rev. Code 43 (1956).

Wisconsin (Adopted in 1848)

We, the people of Wisconsin, grateful to Almighty God for our freedom, in order to secure its blessings, form a more perfect government, insure domestic tranquillity and promote the general welfare, do establish this constitution. 1 Wis. Stat. 28 (1957).

Wyoming (Adopted in 1890)

We, the people of the State of Wyoming, grateful to God for our civil, political and religious liberties, and desiring to secure them to ourselves and perpetuate them to our posterity, do ordain and establish this Constitution. 1 Wyo. Stat. 51 (1957).

APPENDIX E

HOUSE OF REPRESENTATIVES

83D CONGRESS
2d Session

REPORT
No. 1693

AMENDING THE PLEDGE OF ALLEGIANCE TO THE FLAG OF THE UNITED STATES

MAY 28, 1954.—Referred to the House Calendar and ordered to be printed

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Mr. JONAS of Illinois, from the Committee on the Judiciary, submitted the following

REPORT

[To accompany H. J. Res. 243]

The Committee on the Judiciary, to whom was referred the joint resolution (H. J. Res. 243) to amend the pledge of allegiance to the flag of the United States of America, having considered the same, report favorably thereon with an amendment and recommend that the joint resolution, as amended, do pass.

The Amendment is as follows:

Page 2, line 1, strike out the comma after the words "one Nation".

PURPOSE

The act of June 22, 1942 (ch. 435, 56 Stat. 1074), as amended, relates to rules and customs pertaining to the display and use of the flag of the United States of America. Section 7 of that act contains the pledge of allegiance to the flag; and it is the purpose of this proposed legislation to amend that pledge by adding the words "under God" so as to make it read, in appropriate part, "one Nation under God, indivisible,".

STATEMENT

Since the introduction of this legislation the committee and a great number of the individual Members of Congress have received communications from all over the United States urging the enactment of this measure.

At this moment of our history the principles underlying our American Government and the American way of life are under attack by a system whose philosophy is at direct odds with our own. Our American Government is founded on the concept of the individuality and the dignity of the human being. Underlying this concept is the belief that the human person is important because he was created by God and endowed by Him with certain inalienable rights which no civil authority may usurp. The inclusion of God in our pledge therefore would further acknowledge the dependence of our people and our Government upon the moral directions of the Creator. At the same time it would serve to deny the atheistic and materialistic concepts of communism with its attendant subservience of the individual.

The Supreme Court ruled in 1892 that "this is a religious nation."[1] It reiterated this holding, more recently (1951), when it stated:

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[1] *Church of the Holy Trinity* v. *U. S.* (1892) (143 U. S. 457, 470).

> We are a religious people whose institutions presuppose a supreme being.[2]

Those words by our Supreme Court are true in a very fundamental and realistic sense. From the time of our earliest history our peoples and our institutions have reflected the traditional concept that our Nation was founded on a fundamental belief in God. For example our colonial forebears recognized the inherent truth that any government must look to God to survive and prosper. In the year 1620, the Mayflower compact, a document which contained the first constitution in America for complete self-government, declared in the opening sentence "In the name of God. Amen." This was an open recognition, by our forebears, of the need for the official conjunction of the laws of God with the laws of the land.

It was William Penn who said: "Those people who are not governed by God will be ruled by tyrants."

Four years before the Declaration of Independence, we find George Mason arguing to the General Court of Virginia that—

> All acts of legislature apparently contrary to the natural right and justice are, in our laws, and must be in the nature of things considered as void. The laws of nature are the laws of God, whose authority can be superseded by no power on earth.

On July 4, 1776, our Founding Fathers proclaimed our Declaration of Independence which no less than four times refers to the existence of the Creator. It states in part:

> When in the Course of human events, it becomes necessary for one people to dissolve the political bands which have connected them with another and to assume among the powers of the earth, the separate and equal

[2] *Zorach* v. *Clauson* (1951) (343 U. S. 306, 313).

> station to which the Laws of Nature and of Nature's God entitle them, a decent respect to the opinions of mankind requires that they should declare the causes which impel them to the separation.
>
> We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty, and the pursuit of Happiness.

This same document appeals to "the Supreme Judge of the world that this Nation be free," and pledges our Nation to support the Declaration "with a firm reliance on the protection of divine Providence."

During the Presidency of Abraham Lincoln, the Congress passed the act of April 22, 1864, directing that the inscription "In God we trust" be placed on our coins. This avowal of faith has been imprinted on billions and billions of coins during the last 90 years.

Later at Gettysburg on November 19, 1863, Lincoln said:

> That we here highly resolve that these dead shall not have died in vain; that this Nation, under God, shall have a new birth of freedom, and that government of the people, by the people, for the people shall not perish from the earth:

Recently President Eisenhower joined with Bishop Fulton J. Sheen, Dr. Norman Vincent Peale, Rabbi Norman Salit, and the American Legion Commander, Arthur J. Connell, in the American Legion's Back to God appeal in connection with its Four Chaplains' Day, commemorating the four military chaplains who heroically gave their lives when the troopship *Dorchester* was sunk in 1943. The President declared that "all the history of America" bears witness to the truth that "in time of test or trial we instinctively turn to God." "Today, as then (Gettysburg), there is need for positive acts of renewed recognition that faith is our surest * * * strength, our greatest resource."

Representative Louis C. Rabaut who testified at the hearing before the subcommittee aptly stated the need for this legislation in the following words:

> By the addition of the phrase "under God" to the pledge, the consciousness of the American people will be more altered to the true meaning of our country and its form of government. In this full awareness we will, I believe, be strengthened for the conflict now facing us and more determined to preserve our precious heritage.
>
> More importantly, the children of our land, in the daily recitation of the pledge in school, will be daily impressed with a true understanding of our way of life and its origins. As they grow and advance in this understanding, they will assume the responsibilities of self-government equipped to carry on the traditions that have been given to us. Fortify our youth in their allegiance to the flag by their dedication to "one Nation, under God."

Since our flag is symbolic of our Nation, its constitutional government and the morality of our people, the committee believes it most appropriate that the concept of God be included in the recitations of the pledge of allegiance to the flag. It should be pointed out that the adoption of this legislation in no way runs contrary to the provisions of the first amendment to the Constitution. This is not an act establishing a religion or one interfering with the "free exercise" of religion. A distinction must be made between the existence of a religion as an institution and a belief in the sovereignty of God. The phrase "under God" recognizes only the guidance of God in our national affairs. The Supreme Court has clearly indicated that the references to the Almighty which run through our laws, our public rituals, and our ceremonies in no way flout the provisions of the first amendment (*Zorach* v. *Clauson* (343 U. S. 306, 312-313)). In so construing the first amendment, the Court

pointed out that, if this recognition of the Almighty was not so, then even a fastidious atheist or agnostic could object to the way in which the Court itself opens each of its sessions, namely, "God save the United States and this Honorable Court" (id., 313).

Included as a part of this report is an opinion from the Legislative Reference Service of the Library of Congress, concerning the proper placement of the words "under God" in the pledge of allegiance.

MAY 11, 1954.

To: Mr. Cyril F. Brickfield [Assistant Counsel], House Committee on the Judiciary.

Subject: Placing of the words "under God" in the pledge of allegiance.

The pledge of allegiance to the flag was recognized and codified by Congress in the Flag Code of 1942 (act of June 22, 1942, amended December 22, 1942, U. S. C. 36:172). The pledge law now reads: "I pledge allegiance to the flag of the United States of America and to the Republic for which it stands, one Nation indivisible, with liberty and justice for all."

Currently, several proposals are pending, to insert in this pledge the words "under God." These present several alternatives as to placement and punctuation:

(1) • • • Republic for which it stands, one Nation, under God, indivisible, with liberty • • •

(2) • • • Republic for which it stands, one Nation under God, indivisible, with liberty • • •

(3) • • • Republic for which it stands, one Nation indivisible under God, with liberty • • •

You have asked for a brief memorandum on the question of placement and punctuation, and whether the rules of grammar point to one form rather than another. The present statement is limited to this narrow point. Of course, before any judgment can be expressed, the fundamental question must be met—

what is the exact meaning intended by the proposed insertion? On this point, we have some remarks in the Congressional Record as a guide.

Representative Rabaut, who introduced Joint Resolution 243, explained his measure in the Congressional Record of February 12, 1954, page A-1115. "Unless we are willing to affirm our belief in the existence of God and His creator-creature relationship to man, we drop man himself to the significance of a grain of sand. * * * Children and Americans of all ages must know that this is one Nation which "under God" means "liberty and justice for all."

Senator Ferguson, who introduced Senate Joint Resolution 126, commented that "Our Nation was founded on a fundamental belief in God * * * communism, on the contrary, rejects the very existence of God." (See Congressional Record, April 1, 1954, p. A-2527.)

It seems likely, then, that the insertion is intended as a general affirmance of the proposition that the United States of America is "founded on a fundamental belief in God." The new language should therefore be inserted, and punctuated, so as most clearly to indicate this general thought. Under the generally accepted rules of grammar, a modifier should normally be placed as close as possible to the word it modifies. In the present instance, this would indicate that the phrase "under God," being intended as a fundamental and basic characterization of our Nation, might well be put immediately following the word "Nation." Further, since the basic idea is a Nation founded on a belief in God, there would seem to be no reason for a comma after Nation; "one Nation under God" thus becomes a single phrase, emphasizing precisely the idea desired by the authors noted above.

This reading, it will be noted, substitutes the basic concept of "one Nation under God" for the phrase now in law, "one Nation indivisible"; and "indivisible" becomes a separate prime modifier.

In the alternative reading, "one Nation indivisible under God," the phrase "under God" would by the

normal rules of grammar be read as modifying "indivisible," rather than "Nation." By the same reasoning, in the reading "one Nation under God indivisible," indivisible would naturally be construed as modifying the word "God."

It may be noted in passing that as the expression is used in Lincoln's Gettysburg Address [that this Nation, under God, shall have a new birth of freedom * * *] the phrase "under God" seems to mean "with the help of God." Lincoln was solemnly asking his people to resolve that the Nation, with God's help, should have a new birth of freedom. The difference in context seems adequate reason for the punctuation as given.

W. C. GILBERT, *Assistant Director.*

CHANGES IN EXISTING LAW

In compliance with clause 3 of rule XIII of the House of Representatives there is printed below in roman type without brackets existing law in which no change is proposed by enactment of this bill: New provisions proposed to be inserted are shown in italic.

TITLE 28, UNITED STATES CODE

§ 172. PLEDGE OF ALLEGIANCE TO THE FLAG; MANNER OF DELIVERY

The following is designated as the pledge of allegiance to the flag: "I pledge allegiance to the flag of the United States of America and to the Republic for which it stands, one Nation *under God,* indivisible, with liberty and justice for all." Such pledge should be rendered by standing with the right hand over the heart. However, civilians will always show full respect to the flag when the pledge is given by merely standing at attention, men removing the headdress. Persons in uniform shall render the military salute.

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IN THE

Supreme Court of the United States

October Term, 1961

No. 468

In the Matter of the Application
of
STEVEN I. ENGEL, DANIEL LICHTENSTEIN, MONROE LERNER, LENORE LYONS and LAWRENCE ROTH,
Petitioners,
against
WILLIAM J. VITALE, JR., PHILIP J. FREED, MARY HARTE, ANNE BIRCH and RICHARD SAUNDERS, constituting the Board of Education of Union Free School District No. 9, New Hyde Park, New York,
Respondents,
directing them to discontinue a certain school practice,
and
HENRY HOLLENBERG, ROSE LEVINE, MARTIN ABRAMS, HELEN SWANSON, WALTER F. GIBB, JANE EHLEN, RALPH B. WEBB, VIRGINIA ZIMMERMAN, VIRGINIA DAVIS, VIOLET S. COX, EVELYN KOSTER, IRENE O'ROURKE, ROSEMARY PETELENZ, DANIEL J. REEHIL, THOMAS DELANEY and EDWARD L. MACFARLANE,
Intervenors-Respondents.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK.

REPLY BRIEF OF PETITIONERS IN SUPPORT OF CERTIORARI

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ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK.

REPLY BRIEF OF PETITIONERS IN SUPPORT OF CERTIORARI

Preliminary Statement

This brief is submitted by petitioners in reply to the joint brief of respondents and intervenors-respondents opposing certiorari. It will be confined primarily to a

consideration of the argument made in Point II of the joint brief opposing certiorari (beginning on p. 24 of that brief), which urges this Court to deny the petition herein solely on the basis of what respondents and intervenors-respondents claim are technical errors in the petition.

Petitioners believe that a lengthy reply to Point I of the joint brief opposing certiorari is unnecessary. In that point, respondents and intervenors-respondents argue that the saying of the Regents' Prayer in the public schools of the New York school district involved in this proceeding is "in harmony with prior rulings of this Court", because the Prayer is similar in language to many "public utterances", and because of the decision of this Court in *West Virginia State Board of Education* v. *Barnett*, 319 U. S. 624. Petitioners respectfully submit that the fatal defect in this argument is that it equates religious indoctrination of public school children by means of a state-composed prayer to incidental references to God made by the officials of a religious people.

As for the *Barnett* case, in which this Court struck down as unconstitutional a regulation of the West Virginia Board of Education requiring participation of public school teachers and children in the Pledge of Allegiance, petitioners submit that the interpretation by respondents and intervenors-respondents of this Court's decision in that case is merely a refinement of the defective argument referred to hereinabove. There is nothing unconstitutional in the Pledge of Allegiance, or the saying of that Pledge in State public schools. On the other hand, the First Amendment, particularly as it is interpreted in *McCollum* v. *Board of Education*, 333 U. S. 203, and *Zorach* v. *Clausen*, 343 U. S. 306, does prohibit religious instruction and worship in public schools. Respondents and intervenors-respondents would have us accept the theory advanced by the Jehovah's Witnesses that the addition of the phrase "under God" to the Pledge of Allegiance converts the saying of the

Pledge into a religious activity, such as the saying of the Regents' Prayer. That theory, however, is merely another way of equating an incidental reference to God with religious indoctrination. It flies in the face of common sense, and, in any event, in the *Barnett* case it was rejected by this Court.

POINT I

Petitioners respectfully submit that they have properly invoked the jurisdiction of this Court.

In Point II of their joint brief, respondents and intervenors-respondents argue that petitioners have improperly invoked the jurisdiction of this Court for two alleged reasons: (1) the petition herein refers to 28 U. S. C. § 1254, instead of 28 U. S. C. § 1257; and (2) petitioners seek review by writ of certiorari instead of by appeal. Petitioners submit that it is respondents and intervenors-respondents who are in error, and not petitioners.

(1)

It is, of course, true that the petition refers inadvertently to 28 U. S. C. § 1254 instead of 28 U. S. C. § 1257, but this is not to say that petitioners did not properly invoke the jurisdiction of this Court. The petition does set forth all of the essential jurisdictional facts—*i.e.*, the existence of a final judgment of the highest court of the State of New York, and the announcement of that judgment within less than 90 days prior to the filing of the petition. If the petition is looked upon as a form of pleading—which, petitioners submit, it is—and if a proper pleading sets forth facts, then the writ would seem to be a proper pleading.

Moreover, if the petition is examined in the light of Rule 23 of this Court—more particularly, Paragraph 1(a) (iii) of that rule—it will be seen that the petition complies with the rule, since the petition does set forth "the statuory

provision *believed* to confer on this court jurisdiction to review the judgment or decree in question by writ of certiorari." The worst that can be said about the petition is, neither that it fails to show jurisdiction, nor that it fails to comply with Rule 23, but that petitioners' belief as to the applicable law was erroneous. What the argument of respondents and intervenors-respondents boils down to is that the determination of a question of law in a proceeding before this Court should depend upon what one of the parties *believes* to be law instead of what actually *is* the law. Indeed, it may be said, that in this particular proceeding, if there was any doubt about the applicable law, or any defect in the statement thereof, that doubt has been removed and the defect cured by the joint brief of respondents and intervenors-respondents, which makes it quite clear that the correct section for invoking jurisdiction of this Court, on the basis of the facts set forth in the petition, is 28 U. S. C. § 1257.

(2)

It is also perhaps true that the resolution of the respondent school board dated July 8, 1958 might properly be deemed a "statute" for the purposes of an appeal under 28 U. S. C. § 1257(2), on the authority of the decisions of this Court cited on page 25 of the joint brief of respondents and intervenors-respondents, but this is not to say that, even assuming such to be the true rule of construction, petitioners may not properly seek review of the decision below by writ of certiorari under 28 U. S. C. § 1257(3).

It is significant that in each of the cases cited by respondents and intervenors-respondents the person or persons seeking review were granted that review. True, they sought review by appeal under what is now 28 U. S. C. § 1257(2), but it does not follow that they would have been *denied* review if they had proceeded by writ of certiorari under what is now 28 U. S. C. § 1257(3). Particularly

significant is the earliest decision cited by respondents and intervenors-respondents in *Williams* v. *Bruffy*, 96 U. S. 76, where this Court held that the appellant, who sought review of a decision concerning a Confederate statute, could have invoked the jurisdiction of the Court *either* under what is now 28 U. S. C. § 1257(2) *or* what is now the second half of 28 U. S. C. § 1257(3).

Petitioners submit that all that the citations of respondents and intervenors-respondents prove is that petitioners could have properly invoked the jurisdiction of this Court if they had proceeded by appeal. The citations do not prove the converse—*i.e.*, that petitioners have improperly invoked the jurisdiction of this Court because they have proceeded by writ of certiorari.

In numerous cases where an appeal might have been taken under what is now 28 U. S. C. § 1257(2), but where review was initially sought by certiorari under what is now 28 U. S. C. § 1257(3), the writ has been granted by this Court. *H. P. Hood & Sons* v. *Du Mond*, 336 U. S. 525; *International Union* v. *Wisconsin Employment Relations Board*, 336 U. S. 245; *Takahashi* v. *Fish and Game Commission*, 334 U. S. 410; *Union Brokerage Co.* v. *Jensen*, 322 U. S. 202; *Jones* v. *Opelika*, 319 U. S. 103; *Murdock* v. *Pennsylvania*, 319 U. S. 105.

Moreover, the leading textbook authorities on the subject have always assumed that where jurisdiction of this Court could be invoked by appeal, under 28 U. S. C. § 1257(2), it could also, at the option of the person or persons seeking review, be invoked by writ of certiorari under 28 U. S. C. § 1257(3). *Robertson and Kirkham*, Jurisdiction of the Supreme Court of the United States (1951 Ed.), § 10, p. 20; *Moore's Federal Practice*, Rules and Official Form As Amended (1961 Ed.), § 6, p. 39.

Respondents and intervenors-respondents point out that Congress has provided that an appeal improperly taken

may be regarded and acted on as a petition for writ of certiorari under 28 U. S. C. § 2103, whereas there is no similar statutory provision with respect to a document initially filed as a petition for writ of certiorari. Petitioners respectfully submit that the reason for this is, as shown by the cases and authorities cited immediately hereinabove, that no similar statutory provision is necessary in the latter situation.

Finally, it remains to be pointed out, that, even if 28 U. S. C. § 1257 contains the pitfall which respondents and intervenors-respondents see, and that petitioners may invoke the jurisdiction of this Court under only one of the sub-divisions thereof, petitioners still submit that they have properly invoked the jurisdiction of this Court by writ of certiorari under 28 U. S. C. § 1257(3), since that subdivision is the only sub-division which relates to "where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States". Petitioners respectfully submit that the present case is certainly one in which the rights and privileges of the petitioners under the First and Fourteenth Amendments of the United States Constitution have been specially set up or claimed from the very first. As pointed out in the petition herein (pp. 6-7), petitioners made it quite clear in their Article 78 Proceeding in the New York Supreme Court, Nassau County, that their right and their children's right to separation of church and state and to freedom of religion in the sphere of public education are at stake in this case. See *Pennsylvania* v. *Board of Trusts*, 353 U. S. 230, 231.

CONCLUSION

Petitioners respectfully submit that the substantial federal questions presented by this proceeding warrant the consideration of this Court, and they respectfully repeat the request that the petition herein for a writ of certiorari be granted.

Respectfully submitted,

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Supreme Court of the United States

October Term, 1961

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No. 468

In the Matter of the Application
of
STEVEN I. ENGEL, DANIEL LICHTENSTEIN, MONROE LERNER, LENORE LYONS and LAWRENCE ROTH,
Appellants,
against
WILLIAM J. VITALE, JR., PHILIP J. FREED, MARY HARTE, ANNE BIRCH and RICHARD SAUNDERS, constituting the Board of Education of Union Free School District Number Nine, New Hyde Park, New York,
Respondents,
directing them to discontinue a certain school practice
and
HENRY HOLLENBERG, ROSE LEVINE, MARTIN ABRAMS, HELEN SWANSON, WALTER F. GIBB, JANE EHLEN, RALPH B. WEBB, VIRGINIA ZIMMERMAN, VIRGINIA DAVIS, VIOLET S. COX, EVELYN KOSTER, IRENE O'ROURKE, ROSEMARIE PETELENZ, DANIEL J. REEHIL, THOMAS DELANEY and EDWARD L. MAC FARLANE,
Intervenors-Respondents

MOTION BY THE AMERICAN JEWISH COMMITTEE AND THE ANTI-DEFAMATION LEAGUE OF B'NAI B'RITH FOR LEAVE TO FILE A JOINT BRIEF AS *AMICI CURIAE*

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SOL RABKIN and PAUL HARTMAN,
Attorneys for
Anti-Defamation League of B'nai B'rith,
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To

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Supreme Court of the United States

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of

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Intervenors-Respondents.

MOTION BY THE AMERICAN JEWISH COMMITTEE AND THE ANTI-DEFAMATION LEAGUE OF B'NAI B'RITH FOR LEAVE TO FILE A JOINT BRIEF AS *AMICI CURIAE*

The undersigned, as counsel for the American Jewish Committee and the Anti-Defamation League of B'nai B'rith respectfully move this Court for leave to file a joint brief as *amici curiae*.

The American Jewish Committee, founded in 1906, was incorporated by Act of the Legislature of the State of New York in 1911. Its Charter states:

> The objects of this corporation shall be, to prevent the infraction of the civil and religious rights of Jews, in any part of the world; to render all lawful assistance and to take appropriate remedial action in the event of threatened or actual invasion or restriction of such rights, or of unfavorable discrimination with respect thereto * * *

B'nai B'rith, founded in 1843, is the oldest civic service organization of American Jews, which represents a membership of more than 350,000 men and women and their families. The Anti-Defamation League was organized in 1913 as a section of the parent organization to advance goodwill and proper understanding between Americans and translate into greater effectiveness the ideals of American democracy. It is, therefore, dedicated to the protection of freedom of religion and combatting religious discrimination.

It has been among the fundamental tenets of the organizations which seek permission to appear as *amici curiae* herein that the welfare and the security of members of minority religious groups in the United States depend upon the preservation of constitutional guarantees for all; and that an invasion of the rights of any religious group is ultimately a threat to the religious freedom of all groups and to the individual members thereof.

It was in furtherance of this interest and belief that the petitioners herein participated as *amici curiae* in a number of cases before this Court bearing on church-state issues, including *McCollum* v. *Board of Education*, 333 U. S. 203 (1948), *Gallagher* v. *Crown Kosher Super Market*, 366 U. S. 617 (1961) and *Torcaso* v. *Watkins*, 367 U. S. 486 (1961).

This case places in issue the constitutionality under the First Amendment of prayer as part of the opening exercise in the public schools of the State of New York. While the constituency of both of the *amici* includes vast numbers of people who not only believe in the existence of God, but devoutly worship Him, we believe that prayer, in our democratic society, is a matter for the home, synagogue and church, and not for the public schools. We wholeheartedly support the principle of separation of church and state for the greater independence and strength of both such institutions, as expressed in the First Amendment to the United States Constitution. Hence, we are concerned with the decision of the New York Court of Appeals upholding the constitutionality of the recitation of the Regents' prayer in the public schools of New Hyde Park.

The question presented by this case is one of great public interest. This case is more than a dispute between two private parties seeking to resolve their differences by litigation. It involves the entire community and may well establish precedent for religious practices in the public schools throughout the country. The petitioners herein believe that the views of a major segment of a minority religious group whose children use the public schools should be heard in addition to the arguments offered by the five parents who instituted this litigation.

If permission to file a brief *amici curiae* is granted, we will confine our argument, as we did in the New York Court of Appeals, to the question of why the recital of the Regents' prayer in the public schools is viewed by Jews as an establishment of religion in violation of the First Amendment. Prayer is a central feature of each of the major Western religions and has a separate and distinct meaning both with respect to form and content for the adherents of each sect and denomination. To deeply religious people, these differences go to the root and essence of their religion. While the Regents' prayer may not be

objectionable to a number of sects and denominations, it is a form of prayer devised by a secular authority and having no place in the religious doctrines to which many Jewish children subscribe.

Our brief would also argue that provision for the excuse of pupils whose parents object to their participation in the school-sponsored religious exercise, does not make the practice any less an establishment of religion.

The attorney for the appellants has consented to our submitting a brief *amici curiae* in this Court. Application was also made to the Board of Education of Union Free School District Number 9. This motion is necessary, however, because the attorneys for the intervenors-respondents have refused consent. (See Appendix A.) Thus, a group of parents who were permitted to intervene in this case solely because it presented issues of great public moment, now seek to prevent other groups, also concerned with the public issues but arguing on the other side, from presenting their views.

Respectfully submitted,

THEODORE LESKES,
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New York 22, New York.

SOL RABKIN and PAUL HARTMAN,
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December 27, 1961

To:

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Gunn, Neier & Daiker, Esqs.,
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APPENDIX A

[LETTERHEAD OF]

HAHN, HAHN & FORD
Attorneys and Counsellors at Law
117 Pennsylvania Avenue
Brooklyn 7, N. Y.

Theodore Leskes, Esq.,
Director, Legal Division,
The American Jewish Committee,
165 East 56th Street,
New York 22, N. Y.

December 19th, 1961.

Re: Engel v. Vitale

Dear Sir:

With respect to your request of December 18th, it is our view that our duty to our clients does not permit us to grant the permission requested by the American Jewish Committee and the Anti-Defamation League of B'nai B'rith, to file a joint brief amici curiae in the above entitled matter now pending before the United States Supreme Court.

We appreciate your interest in this matter but feel our first responsibility is to our clients.

Yours very truly,

Hahn, Hahn & Ford

By: Thomas J. Ford

TJF/ias

cc: Bertram B. Daiker, Esq.
Richard Nolan, Esq.

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OCTOBER TERM, 1961

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Respondents,

directing them to discontinue a certain school practice,

—and—

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Intervenors-Respondents.

OBJECTIONS OF INTERVENORS-RESPONDENTS TO MOTION BY THE AMERICAN JEWISH COMMITTEE AND THE ANTI-DEFAMATION LEAGUE OF B'NAI B'RITH FOR LEAVE TO FILE A JOINT BRIEF AS *AMICI CURIAE*

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Dated: New York, New York
January 18, 1962

Supreme Court of the United States

OCTOBER TERM, 1961

No. 468

In the Matter of the Application of

STEVEN I. ENGEL, DANIEL LICHTENSTEIN, MONROE LERNER, LENORE LYONS and LAWRENCE ROTH,

Petitioners.

—against—

WILLIAM J. VITALE, JR., PHILIP J. FREED, MARY HARTE, ANNE BIRCH and RICHARD SAUNDERS, constituting the Board of Education of Union Free School District Number Nine, New Hyde Park, New York,

Respondents.

directing them to discontinue a certain school practice,

—and—

HENRY HOLLENBERG, ROSE LEVINE, MARTIN ABRAMS, HELEN SWANSON, WALTER F. GIBB, JANE EHLEN, RALPH B. WEBB, VIRGINIA ZIMMERMAN, VIRGINIA DAVIS, VIOLET S. COX, EVELYN KOSTER, IRENE O'ROURKE, ROSEMARIE PETELENZ, DANIEL J. REEHIL, THOMAS DELANEY and EDWARD L. MACFARLANE,

Intervenors-Respondents.

OBJECTIONS OF INTERVENORS-RESPONDENTS TO MOTION BY THE AMERICAN JEWISH COMMITTEE AND THE ANTI-DEFAMATION LEAGUE OF B'NAI B'RITH FOR LEAVE TO FILE A JOINT BRIEF AS *AMICI CURIAE*

This litigation involves the validity under the First and Fourteenth Amendments to the United States Constitution of the "Regents' Prayer", a voluntary non-denominational prayer composed and recommended by the Board of Regents of the University of the State of New York and adopted for use in the public schools of Union Free School District No. 9, New Hyde Park, New York, pursuant to resolution adopted by respondent Board of Education on July 8, 1958. Each of the parties hereto has a direct and immediate interest in the outcome of the case and in the constitutional status of the Regents' Prayer. Petitioners, two of whom are of the Jewish faith, are taxpayers of the School District and the parents of children actually attending the public schools of the District (R. 11-12, 54).* Each of the intervenors-respondents is and, throughout the course of this litigation has been, a taxpayer of the district and a parent of children actually attending the schools of the district (R. 54). They are the parents of thirty-seven children attending the various schools of the district and these intervenors-respondents include members of the Hebrew, Protestant and Catholic faiths, and one (Evelyn Koster) who is a member of no organized church. Respondent School District has an obvious interest in this litigation which will affect practices approved by it for use in its schools. The Board of Regents of the University of the State of New York has participated as *amicus curiae* throughout the litigation in the courts of New York, and has moved for leave to file a brief *amicus curiae* in this Court, because of its obviously direct interest in sustaining the constitutional validity of the Prayer, composed and recommended by it.

Intervenors-respondents have refused consent to and presently oppose the application of the American Jewish

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* Except as otherwise identified, references are to pages of the Record on Appeal submitted to this Court by petitioners in support of their petition for writ of certiorari.

Committee and the Anti-Defamation League of B'nai B'rith. It is clear from the moving papers that these organizations have no direct interest in this litigation. They do not base their request for participation on the ground that they represent taxpayers within the School District or that they represent any parents of children actually attending the schools of the District. Neither do they demonstrate that they are actively interested in any other cases involving analogous issues, the outcome of which may be directly or immediately influenced by this Court's determination of the validity of the Regents' Prayer. In short, these organizations seek to participate because of a general interest in the judicial construction of the First Amendment. It is submitted that this general interest is not a sufficient basis for permitting such participation especially where there are many other organizations representing diverse civic, educational or religious groups which may seek, on the basis of a similar general interest, to file *amicus curiae* briefs either in support of or in opposition to the Prayer. We have already been advised that at least four other such organizations are interested in filing such briefs in this case, some in support of, and some in opposition to, the position of the petitioners; and undoubtedly there will be others.

Counsel for intervenors-respondents are reluctant to approve any of these requests and do not confine their opposition to the present application of the American Jewish Committee and the Anti-Defamation League. It is our position that the orderly presentation of this case requires that participation be limited to parties having a direct interest in the constitutional status of the Regents' Prayer or having a right to file *amicus curiae* briefs under the Rules of this Court. The American Jewish Committee and the Anti-Defamation League have neither a direct interest in this litigation nor a right to participate under the Rules of this Court. It is submitted that they should not be permitted to participate as *amici curiae*.

The moving organizations are incorrect in assuming, at pages 3-4 of their motion, that they can present any novel argument that prayer "has a separate and distinct meaning both with respect to form and content for the adherents of each sect and denomination" and that the Regents' Prayer is objectionable to a number of sects and denominations as "a form of prayer devised by a secular authority". This is precisely the argument which counsel for petitioners have consistently presented in the courts below. No claim is or can be made that counsel for petitioners are not fully competent in all respects to present this and all other arguments to this Court.

It is therefore respectfully submitted that, under these circumstances, the wholesale filing of *amici* briefs by private organizations claiming some indirect interest in the litigation can serve no useful purpose and can lead only to unnecessary complications. For that reason it is respectfully submitted that the present motion by the American Jewish Committee and the Anti-Defamation League for leave to file a joint brief *amici curiae* should be denied.

Dated: New York, New York
January 18, 1962

Respectfully submitted,

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No. 468

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of
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Petitioners-Appellants,
against
WILLIAM J. VITALE, JR., PHILIP J. FREED, MARY HARTE, ANNE BIRCH and RICHARD SAUNDERS, constituting the Board of Education of Union Free School District Number Nine, New Hyde Park, New York,
Respondents-Respondents,
directing them to discontinue a certain school practice,
and
HENRY HOLLENBERG, ROSE LEVINE, MARTIN ABRAMS, HELEN SWANSON, WALTER F. GIBB, JANE EHLEN, RALPH B. WEBB, VIRGINIA ZIMMERMAN, VIRGINIA DAVIS, VIOLET S. COX, EVELYN KOSTER, IRENE O'ROURKE, ROSEMARIE PETELENZ, DANIEL J. REFHIL, THOMAS DELANEY and EDWARD L. MACFARLANE,
Intervenors-Respondents.

On Writ of Certiorari to the Court of Appeals of the State of New York

MOTION OF SYNAGOGUE COUNCIL OF AMERICA AND NATIONAL COMMUNITY RELATIONS ADVISORY COUNCIL FOR LEAVE TO FILE BRIEF *AMICI CURIAE*

LEO PFEFFER
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Supreme Court of the United States

October Term, 1961

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In the Matter of the Application

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The undersigned, as counsel for the Synagogue Council of America and the National Community Relations Advisory Council, and on their behalf, respectfully move this Court for leave to file a brief *amici curiae* in the above-entitled action.

The Synagogue Council of America is a co-ordinating body consisting of the organizations representing the three divisions of Jewish religious life: Orthodox, Conservative and Reform. It is composed of:

Central Conference of American Rabbis, representing the Reform rabbinate;

Rabbinical Assembly of America, representing the Conservative rabbinate;

Rabbinical Council of America, representing the Orthodox rabbinate;

Union of American Hebrew Congregations, representing the Reform congregations;

Union of Orthodox Jewish Congregations of America, representing the Orthdox congregations;

United Synagogue of America, representing the Conservative congregations.

The National Community Relations Advisory Council is a co-ordinating body comprised of the following national lay Jewish organizations, in addition to the congregational bodies mentioned above, concerned with American Jewish community relations:

American Jewish Congress;

Jewish Labor Committee;

Jewish War Veterans of the United States;

and fifty-two local Jewish Community Councils, including all the major cities in the United States.

The organizations affiliated with the Synagogue Council of America and the National Community Relations Advisory Council include in their membership the overwhelming majority of Americans affiliated with Jewish organizations. We believe, therefore, that in submitting this brief we speak for the greater part of American Jewry.

The present case raises questions as to the constitutionality of the practice of the daily recitation of a religious prayer in public schools. The prayer in question was composed by state officials. By regulation of the respondent school board, it is recited daily in each class in the schools under its jurisdiction. The petitioners claim that this requirement violates the First Amendment to the United States Constitution as made applicable to the states by the Fourteenth Amendment. The undersigned organizations support that claim.

The petitioners are parents of children attending classes in which the recitation of the prayer is required. The suit was brought against the five members of the Board of Education of Union Free School District No. 9, New Hyde Park, New York. A group of parents of children in the schools who support recitation of the prayer were allowed to intervene; they appear here as respondents.

The courts of New York State dismissed petitioners' claim that the prayer recitation requirement violated their constitutional rights. In doing so, however, they required that the respondent school board take steps to see that participation in the exercise by any pupil was not "compulsory." This was done on the theory that petitioners' rights would not be violated, even by recitation of a religious prayer, if they could have their children excused from participation in the exercise. The state courts further

found, despite allegations in petitioners' complaint to the contrary and without hearing any evidence on the point, that the prayer in question was not "sectarian."

The undersigned organizations are deeply committed to the traditions of the Jewish religion. Many of them are directly involved in maintaining religious worship and in the vital task of religious teaching. They believe, however, that such worship and teaching are not appropriate in public schools.

In taking this position, the undersigned organizations follow their firm attachment to the constitutional principle of separation of church and state and their unwavering support of the constitutional guarantee of religious freedom. In support of their views, they have in the past submitted briefs *amicus curiae* to this and other courts, most recently in *Gallagher* v. *Crown Kosher Super Market* (October Term, 1960, No. 11) and *Braunfeld* v. *Gibbons* (October Term, 1960, No. 67), and earlier in *People ex rel. McCollum* v. *Board of Education*, 333 U. S. 203 (1948).

If permitted to submit a brief in this case, the undersigned will present arguments that are based on their experience in counselling with millions of Jews in this country. In particular, they will argue that it is entirely illusory to believe, as did the courts below, that the element of coercion in the public school atmosphere can be eliminated by allowing children to be excused from ceremonies ordained by school officials and conducted by their classroom teachers. They will argue that the decision below cannot be affirmed without ignoring the fact that, despite the right to withdraw, there is "an obvious pressure upon children to attend * * *." Mr. Justice Frankfurter concurring in *People ex rel. McCollum* v. *Board of Education*, 333 U. S. 203, 227 (1948).

The undersigned organizations will also seek to show, on the basis of their knowledge as spokesmen for religious groups, that the conclusion reached below that the challenged prayer is non-sectarian is erroneous, and that in fact by its very nature, prayer cannot be non-sectarian. They will argue that the prayer, formulated by state officials, is in effect a manifestation of a new sect, "public school religion," which fails to represent the deeply-felt views of those committed to other sects. They will also show that the manner of its recitation cannot be accepted by all Jews.

We have sought the consent of counsel for the parties to the filing of this brief. Counsel for petitioners consented. Counsel for respondent school board refused. We have not received a response from counsel for the intervenors.

Respectfully submitted,

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January 31, 1962

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IN THE

Supreme Court of the United States

October Term, 1961

No. 468

STEVEN I. ENGEL, *et al.*,
Petitioners,

v.

WILLIAM J. VITALE, JR., *et al.*,
Respondents.

On Writ of Certiorari to the Court of Appeals of the State of New York

MOTION FOR LEAVE TO FILE A BRIEF AS *AMICUS CURIAE*

The American Ethical Union hereby respectfully moves for leave to file a brief *amicus curiae* in this case. Permission to submit a brief *amicus* has been requested but counsel for Respondents and for Intervenor-Respondents have declined to consent thereto.

The American Ethical Union is a federation of Ethical Culture Societies and Groups in the United States, which, collectively, constitute a liberal religious fellowship known as the "Ethical Movement" or the "Ethical Culture Move-

ment." There are now twenty-eight Societies and Groups in eleven states and the District of Columbia. Eight of these are located in New York State.

The American Ethical Union is a member of the International Humanist and Ethical Union, which will hold its third International Congress in Oslo this year. The International organization includes groups representing the United States, Great Britain, Belgium, Holland, Austria, India, Norway, France, Germany, Japan and South Africa.

Ethical Culture is a religion and has been widely recognized as such. The Ethical Culture Societies and Groups conduct services and religious schools for children which meet regularly on Sunday mornings. The Leaders of the Ethical Culture Societies, some of them drawn from the ordained ministry of other religious groups, are required to have advanced degrees, post-graduate study in religion and philosophy and to take an intensive course of training before appointment and admission to the Fraternity of Leaders of the American Ethical Union. The Leaders provide the usual pastoral services customarily performed by ministers of religion, such as officiating at marriages, funerals and naming ceremonies, and counselling members of the Societies on ethical and moral problems.

The Ethical Movement believes that:

> "Whether one does or does not believe in God, prayer or immortality, is one's own affair. Membership in an Ethical Society is not conditioned on acceptance or rejection of any one answer to such question. In the Ethical Movement the good life and the rights and duties of human beings are looked upon as stemming from man's relations to man in the family of mankind." [Do You Know THE ETHICAL MOVEMENT?, pamphlet published by the American Ethical Union, 2 West 64th Street, New York 23, N. Y. p. 3].

This Court has held non-theistic beliefs to be religions entitled to protection under the Fourteenth Amendment and has specifically recognized Ethical Culture as such a religion. *Torcaso v. Watkins*, 367 U. S. 488, n. 11.

The issue now before the Court is whether a state may impose on pupils in its public schools a prayer which specifically acknowledges dependence on a Supreme Being. Imposition of this prayer is of direct concern to the American Ethical Union. One of the parent petitioners is a member of an Ethical Culture Society (R. 12). The individual's freedom to determine for himself whether or not to relate his religious aspirations to the existence of a Supreme Being is a fundamental tenet of the Ethical religion. The prayer to which, under the decision of the New York Court of Appeals, children of Ethical Culture members must submit, is thus a direct infringement of their religious liberty and of that of their parents, in violation of the Fourteenth Amendment as interpreted by previous decisions of this Court.

Accordingly, we request permission to file a brief *amicus curiae* in this case, in order to place before this Court considerations related to the effect of the decision below on members, and children of members, of the Ethical Culture Movement and of other non-theistic religions.

Respectfully submitted,

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Intervenors-Respondents.

BRIEF FOR PETITIONERS

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Intervenors-Respondents.

BRIEF FOR PETITIONERS

Opinions Below

The opinion of the Special Term of the Supreme Court of the State of New York, Nassau County (R. 50-116), is reported at 18 Misc. 2d 659, 191 N. Y. S. 2d 453. The majority and concurring opinions of the Appellate Division of the Supreme Court of the State of New York, Second

Department (R. 123-40), are reported at 11 App. Div. 2d 340, 206 N. Y. S. 2d 183. The majority, concurring and dissenting opinions of the Court of Appeals of the State of New York (R. 142-55) are reported at 10 N. Y. 2d 174, 184 N. Y. S. 2d 659, 176 N. E. 2d 579.

Jurisdiction of This Court

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(3).

The judgment of the Court of Appeals was announced on July 7, 1961 (R. 156-7), and entered on October 23, 1961 (R. 158-9). The petition for a writ of certiorari was filed on October 4, 1961, and granted on December 3, 1961 (R. 160).

Constitutional and Statutory Provisions Involved

The constitutional provisions involved in this case are the First and Fourteenth Amendments.

The pertinent part of the First Amendment reads as follows:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; * * *."

Section 1 of the Fourteenth Amendment reads as follows:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Strictly speaking, there are no statutory provisions involved in this case. A critical part of the State action under consideration, however, is a resolution of respondents, as the Board of Education of Union Free School District Number 9, New Hyde Park, New York, which was adopted at an official meeting on July 8, 1958, and is recorded in the minutes of the meeting as follows (R. 40):

> "Mrs. Harte moved, seconded by Mr. Saunders, that the regents prayer be said daily in our schools. Motion carried by majority vote, Mr. Fried voted 'nay.'
>
> The Board of Education gave direction to the District Principal that this be instituted as a daily procedure to follow the Salute to the flag."

Question Presented

Does not State action requiring that a prayer to God, composed by State officials, acting in their official capacity, be said as a daily procedure, following the Pledge of Allegiance to the Flag, in all the public schools of a local school district, violate the guarantee of separation of church and state in the Establishment Clause of the First Amendment to the United States Constitution, made applicable to the States by the Fourteenth Amendment?

Statement of the Case

1. The Facts

Petitioners, five citizens of the State of New York and taxpayers residing in Union Free School District Number 9, New Hyde Park, New York, where their children attend the local public schools, seek to compel respondents, the five members of the local board of education, to discontinue the saying of a prayer now required to be said in those schools (R. 11-13). They are opposed by sixteen intervenors, as well as by respondents (R. 43-7).

Two of the petitioners are of the Jewish faith. One belongs to the Society for Ethical Culture. One is a member of the Unitarian Church. And one is a non-believer (R. 11-12). All are subject to the Education Law of New York, which requires parents to cause their children between the ages of seven and sixteen years to attend a course of full-time day instruction, under penalty of punishment by fine or imprisonment for failure to comply (R. 13, 61).

The prayer under consideration is required to be said pursuant to a resolution adopted by respondents at an official meeting on July 8, 1958 (R. 13). The minutes of the meeting show that, by a vote of 4-1, respondents resolved "that the regents prayer be said daily in our schools," and "gave direction to the District Principal that this be instituted as a daily procedure to follow the Salute to the flag" (R. 40).

The name of the prayer derives from the fact that it was composed by the Board of Regents, the governing body of the Department of Education of the State of New York, and recommended in a statement of belief entitled "The Regents Statement on Moral and Spiritual Training in the Schools," which was unanimously adopted at the Regents' regular meeting on November 30, 1951 (R. 13-14, 28-9, 390). The words of the prayer are as follows (R. 14):

> "Almighty God, we acknowledge our dependence upon Thee, and we beg Thy blessings upon us, our parents, our teachers and our country."

Pursuant to respondents' resolution of July 8, 1958, the prayer is said aloud, daily, at the commencement of the school day, in each class of each public school within the local school district (R. 14, 66). It is said in the presence of the teacher, and is either led by the teacher or by a student selected by the teacher (R. 14, 24-7, 66). Though respondents' resolution does not so provide, respondents claim that they have always directed principals and teachers not to

force or to encourage any child to join in the prayer (R. 27, 66).

Prior to this case, respondents claim to have received only one request that a child be excused from saying the prayer, and they claim to have respected that request (R. 26-7, 66) but Special Term, the only court below which considered the question, has found, as a matter of fact, that the saying of the prayer and the manner and setting in which it is said are contrary to the religions and religious practices of those petitioners who have a religion and contrary to the beliefs held by the petitioner who professes none (R. 15, 66-7).

2. The Proceedings Below

This case began in January, 1959, when petitioners instituted a proceeding at Special Term, under Article 78 of the Civil Practice Act of New York, in which they requested an order in the nature of mandamus directing respondents to discontinue the saying of the prayer (R. 9-10, 54). Such a proceeding, under New York law, is summary and may be decided on papers, and this one was. The "facts" in this case, as stated above, have been taken from those allegations in the petition which have not been explicitly denied in the answer of respondents or the accompanying affidavit of respondent Vitale, a procedure followed by Special Term in arriving at its decision (R. 65-7).

The relief requested by petitioners was denied by Special Term, but the case was remanded to respondents, as the local board of education, for further proceedings in accordance with the opinion expressed by the court that certain features of the procedure connected with the prayer were objectionable because "compulsory" (R. 6-8, 105-9). From this interlocutory order, an appeal was taken by petitioners to the Appellate Division, where the order was unanimously affirmed (R. 123-40).

The case proceeded no further until the proceedings provided for in the interlocutory order were taken by

respondents. These consisted of adopting a set of regulations at an official meeting on September 3, 1959, transmitting them to the principals and teachers in the local school district, and sending a letter to each parent and taxpayer in the district (R. 170-3).

The regulations were as follows (R. 171-2):

> "1. Neither teachers nor any school authority shall comment on participation or non-participation in the exercise nor suggest or request that any posture or language be used or dress be worn or be not used or not worn.
>
> 2. Provision is to be made for those children who are to be excused from participating or from the room during the prayer exercise.
>
> 3. Any child may be excused on written request of the parent or legal guardian and all parents will be so advised that the request should be so made, addressed to the principal of the school which the child attends."

The critical part of the letter was intended to supplement regulation number "3" (R. 172-3):

> "Any parent or guardian who does not wish his child to say the prayer is requested to write a letter to the principal of the school his child attends, indicating whether he wants his child excused from the room or to remain silent in the room while the prayer is being said."

Thereafter, a motion was made by respondents at Special Term for a final order dismissing the petition on the basis of the proceedings taken pursuant to the interlocutory order (R. 169). In an affidavit in support of this motion, respondent Freed stated that, although respondents had received requests that children be excused from saying the prayer, they had received none requesting that children be excused from the classroom, and they had decided "to defer

any decision with respect to the exact provision to be made for any such children until such request is made • • • •" (R. 173).

The final order was granted, and an appeal taken therefrom directly to the Court of Appeals (R. 164-8). That appeal brought into question the validity of the interlocutory order and its affirmance by the Appellate Division. The interlocutory order was sustained and the final order affirmed by a vote of 5-2 (R. 142-57).

Summary of Argument

1. The State action under consideration violates the Establishment Clause of the First Amendment.

(a) The Establishment Clause has been made applicable by the Fourteenth Amendment to acts of State and local officials, and it prohibits any such acts respecting an establishment of religion, and not merely an establishment of a church or sect. "Religion" within the meaning of the Establishment Clause may be nothing more nor less than a single religious belief, such as belief in the existence of God.

(b) The Regents' Prayer is sectarian and denominational, since it includes a declaration of belief in the existence of God, which is a belief not shared by several faiths in this country, including the Society for Ethical Culture, to which one petitioner belongs. It also involves belief in a set form of worship and belief in the practice of asking God's blessings on behalf of the worshipper. Moreover, Special Term found, as a fact, that the prayer is contrary to the religions of petitioners who have a religion and to the beliefs of petitioner who professes none.

(c) The Regents' Prayer is not part of any national "tradition" or "heritage," although prayer in general

may be, since the Regents' Prayer was composed by laymen who are State officials, in their official capacity, in the hope of finding a form of worship acceptable to all. Such a prayer has no tradition behind it in this country, and is not believed to be in use in the public schools of any State outside the State of New York.

(d) The significance of the Regents' Prayer should not be judged by its brevity or simplicity, but by the importance of the beliefs involved in it and the significance of a determination that prayers may be composed by State officials and recited under their direct supervision in public schools. The prayer involved in this case should be judged by the fact that it is part of a recognized drive in this country to introduce religious education and observances in public schools.

(e) The essential and primary purpose and effect of the State action under consideration is to aid religion. The form of the State action, and, specifically, the fact that it may not be "instruction", is immaterial. The statement of belief of the Board of Regents makes it clear that the purpose and intended effect of the Regents in recommending the prayer, and of respondents in instituting it as a daily procedure in the public schools of the local school district, is to promote belief in God. The means or form of achieving that purpose, if not "instruction", is a higher or more extreme form of religious activity.

(f) The factual situation in this case is basically the same as that in *McCollum*. The State action under consideration permits, even requires, religious activity in public school buildings during school hours; it requires pupils not participating in the religious activity to remain in school; and it involves the use of tax-supported buildings to aid religion.

(g) The only factual difference between the present case and *McCollum* makes this case a stronger one for applica-

tion of the doctrine of separation. Whereas in *McCollum* State officials merely cooperated with religious ministers, here they perform the functions of religious ministers. This violates the most fundamental concept in the doctrine of separation, as developed in this country, which is that civil magistrates have no competence in, or jurisdiction over, religious matters.

(h) The element of coercion in this case is stronger than in *McCollum*. The impact of the compulsory school system is, if anything, stronger here because pupils are not merely compelled to attend school; they are compelled to say the Regents' Prayer unless excused. Moreover, as the record shows, because of the brevity of the prayer and its recitation in conjunction with the Pledge of Allegiance, even those pupils who are excused do not leave the classroom. Most important of all, the influence on the minds of pupils necessarily exerted by the fact that education officials, including their teachers, advocate certain religious beliefs cannot be avoided by permitting the pupils to leave their classroom, or even the school building.

(i) The State action under consideration rejects the belief on which the "Founding Fathers" built our national government, belief in the necessity for absolute separation of church and state. It threatens not merely to breach the "wall of separation", but to undermine it completely.

Argument

1. The State action in this case violates the guarantee of separation of church and state in the Establishment Clause of the First Amendment, made applicable to the States by the Fourteenth Amendment.

(a) Certain propositions are beyond the area of legitimate dispute.

Petitioners assume that certain propositions are now beyond the area of legitimate dispute in this Court.

(1) We assume that the Establishment Clause of the First Amendment, though in terms applicable only to laws enacted by Congress, has been made applicable by the Fourteenth Amendment to the laws of a State government and to the acts of State and local officials which have the force of such laws (*Cantwell* v. *State of Connecticut*, 310 U. S. 296, 303; *Everson* v. *Board of Education*, 330 U. S. 1, 5; *People of State of Illinois* ex rel. *McCollum* v. *Board of Education*, 333 U. S. 203, 210; *McGowan* v. *State of Maryland*, 366 U. S. 420, 429; *Torcaso* v. *Watkins*, 367 U. S. 488, 492).

(2) We assume that the Establishment Clause prohibits more than laws establishing a church or sect; it bars any law *respecting an establishment of religion* (*People of State of Illinois* ex rel. *McCollum* v. *Board of Education*, *supra*; *Torcaso* v. *Watkins*, *supra*; *Everson* v. *Board of Education*, *supra*, 330 U. S. at pages 14-15; *McGowan* v. *State of Maryland*, *supra*, 366 U. S. at pages 441-2).

This second proposition does not appear to have been accepted by the majority in the Court of Appeals. In the opinion of the court written by Chief Judge Desmond, the word "law" and the word "respecting", which appear in the Establishment Clause, are treated as if they were not part of the clause at all (R. 143):

> "Saying this simple prayer may be, according to the broadest possible dictionary definition, an act of 'religion', *but when the Founding Fathers prohibited an 'establishment of religion' they were referring to official adoption of, or favor to, one or more sects.*" (Emphasis added.)

(3) Lastly, petitioners assume that the word "religion", as used in the First Amendment may mean nothing more nor less than a single religious belief, such as belief in the existence of God (*Torcaso* v. *Watkins, supra*).

This, too, does not seem to have been accepted by the majority below. Running through both the opinion of Chief Judge Desmond and the concurring opinion of Judge Froessel is the notion that belief in the existence of God is so elementary or "essential" that it is outside the scope of religion, at least as that word is used in the First Amendment. The notion is stated in the opinion of Judge Froessel as follows (R. 145):

> "History and common experience teach us that the perception of a Supreme Being, commonly called God, is experienced in the lives of most human beings. Some, it is true, escape it, or think they do for a time. In any event, that perception is manifest, independent of any particular religion or church, and has become the foundation of virtually every recognized religious faith—indeed, the common denominator. *One may earnestly believe in God, without being attached to any particular religion or church. Hence a rule permitting public school children, willing to do so, to acknowledge their dependence upon Him, and to invoke His blessings, can hardly be called a 'law respecting an establishment of religion'* or 'prohibiting the free exercise thereof' in transgression of the First Amendment, which in nowise prohibits the recognition of God, or laws respecting such recognition." (Emphasis added.)

Any such notion, however, would seem to have been rejected by this Court in the recent *Torcaso* case, *supra*, where

the only "religion" under consideration was belief in the existence of God. In *Torcaso*, Maryland's refusal to issue to an individual, otherwise qualified, a commission to serve as a notary public because he would not declare his belief in God was held by this Court to be a violation of the First Amendment. The State action was characterized in the opinion of the Court written by Mr. Justice Black as follows (367 U. S. at page 490):

> "The power and authority of the State of Maryland thus is put on the side of one particular sort of believers—those who are willing to say they believe in 'the existence of God'."

The State action under consideration in *Torcaso* may not be comparable to that in the present case in all respects. If, however, a declaration of belief in the existence of God was a matter of religion in *Torcaso*, petitioners respectfully submit that a prayer including precisely the same declaration must be so here.

(b) The Regents' Prayer is sectarian and denominational.

The corollary assumption in the opinions of Chief Judge Desmond and Judge Froessel that the Regents' Prayer is non-sectarian and non-denominational would seem to be contrary to a fact judicially noted by this Court in the *Torcaso* case and to one of the few findings of fact made by the court of first instance in this case.

In the opinion of this Court in *Torcaso*, the observation was made that belief in the existence of God is not among the tenents of several faiths practiced in this country. Mr. Justice Black specifically noted that one such faith was "Ethical Culture," the faith of one of the petitioners in the present case (367 U. S. at page 495, note 11).

Moreover, the opinion of Special Term, the only court below which considered the question, contains the express

finding of fact that the saying of the Regents' Prayer and the manner and setting in which it is said are contrary to the religions and religious practices of all the petitioners who have a religion, as well as to the beliefs of the petitioner who professes none (R. 66-7). Special Term held that such a finding necessarily resulted from respondents' failure to challenge the good faith of petitioners' claim that the prayer was contrary to their beliefs (R. 66-7).

Despite this finding, it is true, Special Term subsequently concluded that the prayer was non-sectarian (R. 113):

> "The fact that the prayer and the manner of its saying may not conform to all of the tenets of the Jewish, Unitarian and Ethical Culture groups, or of any other group, does not mean that the prayer is sectarian."

Petitioners respectfully submit, however, that Special Term's conclusion is both unwarranted and self-contradictory. We submit that, by definition, a prayer which conforms to *all* of the tenets of one or more faiths and only to *some*, but not all, of the tenets of others, is sectarian and denominational, particularly if the tenets to which it does not conform are important. We would assume that even respondents and intervenors would agree that belief in the existence of God is important. The Regents' Prayer also involves belief in a set form of worship and belief in the practice of asking God's blessings on behalf of the worshipper.

(c) The Regents' Prayer is not part of any national "tradition" or "heritage."

The majority and concurring opinions of the Court of Appeals, the concurring opinion of the Appellate Division and the opinion of Special Term refer to the Regents' Prayer as part of a national "tradition" or "heritage"

(R. 70, 132, 144). Petitioners respectfully submit that, although *prayer in general* may be an integral part of our national tradition and heritage, a prayer such as that involved in this case, which has been composed by laymen who are State officials, acting in their official capacity, in the hope of finding a form of worship acceptable to all, is most certainly not part of any national tradition or heritage.

In this respect it is significant that, although the well-documented opinion of Special Term begins by stating that "the attempt to find a commonly acceptable prayer is not new" (R. 51), the opinion cites only two instances in which the attempt was made, one, by Benjamin Franklin, being merely an attempt to modify the Lord's Prayer.

The other attempt noted in the opinion of Special Term was recorded by James Madison in a letter to Edward Everett on March 19, 1823, and it was made by William Livingston, before he became Governor of New Jersey, at a time when he was merely a member of the Committee of Trustees for the Lottery Fund for King's College (now Columbia University). In 1753, Livingston composed a prayer which he thought might be said by all of the Protestant students at King's College, when that institution should be built. The prayer was never put in use, and it was roundly criticized in the newspaper in which it was originally published.*

This is what Madison had to say about Livingston's prayer:

> "I recollect to have seen many years ago, a project of a prayer by Governor Livingston, father of the present judge, intended to comprehend and conciliate college students of every Christian denomination, by a form composed wholly of texts and phrases of Scripture. If a trial of the expedient was

* MAHONEY, THE RELATION OF THE STATE TO RELIGIOUS EDUCATION IN EARLY NEW YORK, 1633-1825 (1941), pp. 74-6.

> ever made, it must have failed, notwithstanding its winning aspect, from the single cause that many sects reject all set forms of worship." *

In 1823, it appears, Madison had to think back over a span of almost three-quarters of a century even to recall a significant attempt at composition of a commonly accepted prayer. As far as he was concerned, that isolated attempt was doomed to failure. And, in any event, it was not made by government officials acting in their official capacity.

Today, the statistics would appear to be much the same. Petitioners do not believe that there is any prayer in use in the public schools of any State in this country which, like the prayer involved in this case, has been composed by State officials for use in such schools. In 1955, a prayer virtually identical with the Regents' Prayer was presented to the Honorable Edmund G. Brown, now the Governor but then the Attorney General of California. In the only official opinion on the specific question presented in this case, other than those of the courts below, Governor Brown ruled that the prayer presented to him was a violation of the Establishment Clause of the First Amendment, citing the *Everson*, *McCollum* and *Zorach* decisions of this Court (25 Cal. Ops. Atty. Gen. 316, 1955). This is the "tradition" and "heritage" behind the Regents' Prayer.

(d) The true significance of the Regents' Prayer is not to be judged by its brevity or simplicity.

The opinions of the courts below sustaining the Regents' Prayer emphasize its brevity and simplicity, as if to indicate that the measure of its significance should be its size and form (R. 105, 126, 143, 145). Of course, this emphasis is more than inconsistent with the importance which the same opinions attach to the main belief expressed in the

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* Blakely, American State Papers on Freedom and Religion (1943), p. 592.

prayer, and, as petitioners will point out below, the only real effect of the brevity of the prayer is to strengthen the element of coercion already present in the State action under consideration in this case. These "physical" characteristics of the prayer, however, have much the same type of distorting effect as an optical illusion, and, petitioners respectfully submit, they require the same degree of concentration to overcome.

If State educational officials are now held legally competent to compose and conduct the recitation of a 22-word prayer at the beginning of the school day, on the theory that the beliefs expressed in that prayer are acceptable to the vast majority of citizens, it is difficult to see why they will not be held equally competent to compose and conduct the recitation of a 220-word prayer, or a *second* brief prayer at the *end* of the school day. Moreover, if such other prayer involves beliefs other than belief in God, belief in a set form of worship, and belief in the practice of asking God's blessing on the worshipper, who will judge whether those other beliefs are acceptable to the vast majority?

Madison was faced with a similar problem in 1784 when he opposed "A Bill Establishing a Provision for Teachers of the Christian Faith," in the Virginia Assembly. After the long dark years of religious persecution in England and the Colonies, a bill levying a tax to provide support for religious teachers of their own choosing must have appeared to be a rather modest and even liberal proposal to many of the God-fearing citizens of Virginia. In his famous "Memorial and Remonstrance against Religious Assessments," however, Madison opposed the bill, among other reasons—

> "3. Because it is proper to take alarm at the first experiment on our liberties * * * Who does not see that the same authority which can establish Christianity, in exclusion of all other Religions, may estab-

> lish with the same ease any particular sect of Christianity in exclusion of all other Sects? * * * * "*

The Regents' Prayer may not be a "first experiment," but the State action connected with it is part of one of two great and powerful drives recognized in the minority opinion of this Court written by Mr. Justice Rutledge in the *Everson* case, *supra* (330 U. S. at page 63), and more recently recognized in the majority opinion of the Court in the *McGowan* case (366 U. S. at page 444). Those drives are described and commented upon in the opinion of Mr. Justice Rutledge as follows (330 U. S. at page 63):

> "Two great drives are constantly in motion to abridge, in the name of education, the complete division of religion and civil authority which our forefathers made. *One is to introduce religious education and observances into the public schools.* The other, to obtain public funds for the aid and support of various private religious schools * * * In my opinion both avenues were closed by the Constitution. Neither should be opened by this Court."

Petitioners respectfully submit that, although the Regents' Prayer is brief and simple, the State action under consideration in this case constitutes a gross violation of the guarantee of church and state in the Establishment Clause of the First Amendment.

(e) The essential or primary, if not the only, purpose and effect of the State action under consideration in this case is to aid religion.

Petitioners assume that the classic expression of the latitude of the Establishment Clause is to be found in the majority opinion of this Court in the *Everson* case, *supra*, 330 U. S. at pages 15-16:

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* Both the bill referred to and Madison's "Memorial and Remonstrance" are set forth in appendices to the dissenting opinion of Mr. Justice Rutledge in the *Everson* case, *supra*, 330 U. S. at pages 63-74.

> "The 'establishment of religion' clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or nonattendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organization or groups and *vice versa*. In the words of Jefferson, the clause against establishment of religion by law was intended to erect 'a wall of separation between Church and State'."

In the *Everson* case, the State action consisted of the repayment of money to parents of school children for bus fares which the children had paid to attend parochial schools. Although such State action provided some indirect aid to religion, this Court held, by a vote of 5-4, that the action did not violate the Establishment Clause because it was in the nature of "public welfare legislation," and its essential purpose and effect was to aid public education (330 U. S. at page 17).

In the *McCollum* case, *supra*, which followed *Everson*, there was no real issue as to the nature of the State action. There, a local board of education permitted religious instruction during school hours in public school buildings, and required those children who chose not to attend to remain in their classrooms. Such instruction, this Court held, was "beyond all question a utilization of the tax-established public school system to aid religious groups to spread their faith. And it falls squarely under the ban of the First Amendment * * *." (330 U. S. at page 210.)

The present case, petitioners respectfully submit, falls into precisely the same category. Although it may be true that the State action under consideration in this case is not, in form, "instruction," that aspect of the case would seem to be immaterial, and the confusion which it created in the courts below would seem to have been entirely unnecessary.*

Petitioners share part of the responsibility for this confusion. Because the decision in the *McCollum* case was favorable to our position in this case, and because the religious activity involved in the prior case was in the form of instruction, we characterized the religious activity in this case as "instruction". For the same reasons, respondents and intervenors argued to the contrary. The dispute, however, was a battle over words which raised form over substance.

The interpretation of the Establishment Clause in the *Everson* case, quoted above, includes the following warning (330 U. S. at page 16):

> "No tax in any amount, large or small, can be levied to support *any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion.*"

Moreover, the recent decisions of this Court in the *Sunday Closing Law Cases* (366 U. S. 420 et seq.), particularly in the *McGowan* case, *supra*, point out that the real question in a case of this type relates not to the *form* of the State action, but rather to its substance or essential *pur-*

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* The concurring opinion of Mr. Justice Beldock in the Appellate Division gives as his "sole" reason for affirming the interlocutory order of Special Term his belief that "the prayer here involved *does not constitute religious teaching* * * *. It gives no training or instruction of a religious nature whatever" (R. 129; emphasis in original). The majority opinion of the Court of Appeals also denies that the prayer is "religious education" (R. 143).

pose and effect. Thus, the Sunday Closing Laws of Maryland and other States were sustained because their essential purpose and effect was to provide the general public with a "uniform day of rest," rather than to encourage the observance of Sunday as a religious holiday (366 U. S. at page 445).

Two Justices of this Court concurred in the decisions in the *Sunday Closing Law* cases, but expressed the opinion that State action should not be held invalid under the Establishment Clause so long as it appeared to serve any legitimate and substantial secular end. Although this concurring opinion is perhaps more favorable than the majority opinion to State action which is being examined in the light of the Establishment Clause, it contains a caveat (366 U. S. at page 466):

> "* * * If the primary end achieved by a form of regulation is the affirmation or promotion of religious doctrine—primary, in the sense that all secular ends which it purportedly serves are derivative from, not wholly independent of, the advancement of religion—the regulation is beyond the power of the state. This was the case in *McCollum.*"

This, petitioners respectfully submit, is also the case now before this Court. Whether or not the State action under consideration here is deemed to be "instruction," "teaching" or "education," the conclusion seems inescapable that its essential or primary, if not its only, purpose and effect is to promote belief in the existence of God.

The Board of Regents have admitted as much in the statement of belief in which they first recommended the prayer that now bears their name. That statement begins as follows (R. 28):

> "BELIEF IS and dependence upon Almighty God was the very cornerstone upon which our Founding Fathers builded."

After thus stating their thesis, the Regents proceed to unfold their purpose (R. 28):

> "* * * In our opinion, the securing of the peace and safety of our country and our State against such dangers points to *the essentiality of teaching our children, as set forth in the Declaration of Independence, that almighty God is their Creator*, and that by Him they have been endowed with their inalienable rights of life, liberty and the pursuit of happiness." (Emphasis added.)

Not petitioners, but the Regents themselves, it will be noted, first used the word "teaching" in connection with the saying of the Regents' Prayer. Moreover, although the Regents mention a secular goal, "the securing of the peace and safety of our country," they indicate quite clearly that it is secondary and derivative in that it is intended to follow and result from teaching children to believe in God.

Immediately after the foregoing quotation, the Regents recommend the saying of the prayer, together with "the act of allegiance to the Flag." Then they repeat and emphasize their initially stated purpose (R. 29):

> "We believe that thus *the school will fulfill its high function of supplementing the training of the home, ever intensifying in the child that love for God*, for parents and for home which is the mark of true character training and the sure guarantee of a country's welfare." (Emphasis added.)

By "school," of course, the Regents mean the compulsory public school system of New York. They apparently consider "intensifying" in pupils a "love for God" to be not only a function, but a "high function," of that system.

Petitioners respectfully submit that the Regents' purpose in recommending the prayer, and respondents' purpose in instituting it as a daily procedure in the public schools of their district, is to promote belief in God by daily prayer. Moreover, if the means or form of accomplish-

ing that purpose is not accurately described as "instruction," "teaching" or "education," it is nonetheless a religious activity; and, since prayer is merely putting into practice the beliefs in which the practitioner has previously been instructed, it is, if anything, a higher or more extreme form of religious activity.

(f) The factual situation in this case is basically the same as that in *McCollum*.

The opinion of this Court in the *McGowan* case, *supra*, lists the fatal defects in the State action under consideration in *McCollum* as follows (366 U. S. at page 452):

> "* * * In McCollum, state action permitted religious instruction in public school buildings during school hours and required students not attending the religious instruction to remain in their classrooms during that time. The Court found that this system had the effect of coercing the children to attend religious classes; * * * In McCollum, the only alternative available to the nonattending students was to remain in their classrooms; * * * In McCollum, there was direct cooperation between state officials and religious ministers; * * * In McCollum, tax supported buildings were used to aid religion; * * *."

(1) In the present case, the State action also "permits" religious activity in public school buildings during school hours, and requires students who do not choose to participate to remain in their classrooms.

The State action under consideration in *McCollum*, was, if anything, more truly permissive than that under consideration here. Under the program involved in *McCollum*; there was provision for religious instruction only to the extent that particular religious sects requested the privilege of giving instruction in their respective faiths, and the majority opinion in *McCollum* noted that instruction in the Jewish faith had been discontinued because there was no request for it (333 U. S. at pages 208-9). Under the

procedure involved in this case, there is provision for the saying of the Regents' Prayer, as a daily procedure in all the schools of the district, *regardless of whether a single parent requests the prayer to be said.* The resolution adopted by respondents on July 8, 1958, *requires*, rather than permits, 'that the Regents' Prayer be said daily in our schools' " (R. 40).

Moreover, under the program involved in *McCollum*, there was an element of choice; the pupils participating in that program could select the particular faith in which they desired instruction (333 U. S. at pages 208-9). Here, there is no such choice: the pupils who wish to join in prayer with their classmates may only join in the Regents' Prayer, no other.

(2) In the present case, as in *McCollum*, the only alternative available to pupils not choosing to participate is to remain "in their classrooms."

On this point, some clarification is necessary. This Court's opinion in the *McGowan* case uses the phrase "in their classrooms" (366 U. S. at page 452), but petitioners assume that the phrase is intended to convey no more than the Court's understanding that the pupils not choosing to participate in the program involved in *McCollum* were required to remain *in school*. The Court's opinion in the *McCollum* case states the actual fact as follows (333 U. S. at page 209):

> "Students who did not choose to take the religious instruction were not released from public school duties; *they were required to leave their classrooms and go to some other place in the school building for the pursuit of their secular studies.*" (Emphasis added.)

In the present case, as the affidavit of respondent Freed in support of respondents' motion for a final order shows (R. 173), the pupils not choosing to participate in the saying

of the prayer actually remain in their classrooms, in the sense that they do not leave the classrooms in which the prayer is said and go to some other place in the school building. According to respondent Freed, this situation results from the fact that no parents have requested that their child be excused from the classroom in which the prayer is being said. There is nothing in the record, however, to indicate that if parents did request that their child be excused from the classroom, the child would be free to leave the school building, or free from school discipline. On the contrary, although the prayer is required to be said at the commencement of the school day, it is definitely required to be said *after* that day has begun, and at a time when attendance at school is compulsory.

(3) Here, as in *McCollum*, tax-supported buildings are used to aid religion.

This final similarity between the factual situation in *McCollum* and the present case requires only the briefest comment. The fact is admitted that, pursuant to the resolution adopted by respondents on July 8, 1958, the Regents' Prayer is being said daily in all the schools of the local school district (R. 20).

(g) The only difference in the factual situation in *McCollum* and that in the present case makes the present case a stronger one for the application of the guarantee of separation in the Establishment Clause.

The only difference between the factual situation in the *McCollum* case and that in the present case lies in the fact that "[i]n McCollum, there was direct cooperation between state officials and religious ministers" (366 U. S. at page 452). In the present case, no such cooperation appears to exist, but this one difference, petitioners respectfully submit, makes this case a stronger one for the application of the guarantee of separation incorporated in the Establishment Clause of the First Amendment.

In this case, instead of merely cooperating with religious ministers, the State officials have performed the functions of ministers. Acting in their capacity as State officials, they have inquired into religious matters and expressed their beliefs on those matters; they have composed a prayer which incorporates their beliefs; they have instituted that prayer as a daily procedure in the public schools of a local school district; and they are now supervising and conducting the saying of the prayer in those schools. It is certainly the fact that a teacher is present whenever the prayer is said, thus not only making certain that it is said, but also that it is said in an orderly and proper way (R. 66). It also appears to be undisputed that if the teacher does not actually lead the saying of the prayer, he or she selects the student who does (R. 14, 24-7, 66).

Undoubtedly, to a limited extent, cooperation between State officials and religious ministers is necessary and proper (*Zorach* v. *Clauson*, 343 U. S. 306). Petitioners respectfully submit, however, that the State action under consideration in this case violates the most fundamental concept in the entire philosophy of separation of church and state, as that philosophy has been developed in this country and incorporated in the Constitution.

If there was any one belief that was shared by all of the Founding Fathers, it was the belief that the civil magistrate had no competence in, or jurisdiction over, religious matters. First expressed by the English philosopher John Locke, this belief was adopted and adapted to the American scene by Thomas Jefferson and James Madison, and it was even shared by "moderates" such as George Washington.

This Court has described "A Bill for Establishing Religious Freedom," which Jefferson wrote, Madison sponsored, and Virginia enacted into law in 1785, "as best reflecting the long and intensive struggle for religious freedom in America, as particularly relevant in the search for

the First Amendment's meaning" (*McGowan* v. *State of Maryland*, *supra*, 366 U. S. at page 437). In that document, Jefferson stated:

> "* * * that the opinions of men are not the object of civil government, nor under its jurisdiction; that to suffer the civil magistrate to extend his powers into the field of opinion and to restrain a profession or propagation of principles on supposition of their ill tendency is a dangerous fallacy, which at once destroys all religious liberty, because he being of course judge of that tendency will make his opinions the rule of judgment and approve or condemn the sentiments of others only as they shall square with or suffer from his own; that it is time enough for the rightful purposes of civil government for its officers to interfere when principles break out into overt acts against peace and good order; * * *." *

This Court has also acknowledged the "Memorial and Remonstrance Against Religious Assessments," written by Madison, as an important original source for determining the meaning of the First Amendment (*Reynolds* v. *United States*, 98 U. S. 145; see also Mr. Justice Rutledge's dissenting opinion in *Everson* v. *Board of Education*, *supra*, 330 U. S. at page 68). Among other reasons, Madison opposed religious assessments—

> "2. Because if religion be exempt from the authority of Society at large, still less can it be subject to that of the Legislative Body. * * *
>
> * * *
>
> 5. Because the bill implies that the Civil Magistrate is a competent Judge of Religious truths or that he may employ Religion as an engine of Civil policy. The first is an arrogant pretention, falsified by the contradictory opinions of rulers in all ages and throughout the world; the second, an unhallowed perversion of the means of salvation.

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* Quoted in Padover, The Complete Jefferson, p. 947.

> 6. Because the establishment proposed by the Bill is not requisite for the support of the Christian Religion. To say that it is, is a contradiction to the Christian Religion itself, for every page of it disavows a dependence on the powers of this world: it is a contradiction to fact; for it is known that this Religion both existed and flourished, not only without the support of human laws, but in spite of every opposition from them; * * *
>
> * * *
>
> 8. Because the establishment in question is not necessary for the support of Civil Government. If it be urged as necessary for the support of Civil Government only as it is a means of supporting religion, and it be not necessary for the latter purpose, it cannot be necessary for the former. If Religion be not within [the] cognizance of Civil Government, how can its legal establishment be said to be necessary to civil Government * * * Rulers who wished to subvert the public liberty, may have found an established clergy convenient auxiliaries. A just government, instituted to secure and perpetuate it needs them not. Such a government will best be supported by protecting every citizen in the enjoyment of his Religion with the same equal hand which protects his person and his property; by neither invading the equal rights of any Sect, nor suffering any Sect to invade those of another." *

As pointed out above, even Washington, who was more moderate than Jefferson and Madison in his views on separation, shared the latter's belief concerning the civil magistrate's incompetence in, and lack of jurisdiction over, religious matters. In a letter written at the end of 1789 to Presbyterians of Massachusetts and New Hampshire who had expressed dismay over the omission in the new Constitution of any reference to the Christian religion, he said the following:

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* The "Remonstrance" is set forth in full in an appendix to Mr. Justice Rutledge's dissenting opinion in the *Everson* case, *supra*, 330 U. S. beginning at page 63.

> "And here, I am persuaded, you will permit me to observe, that *the path of true piety is so plain, as to require but little* POLITICAL *direction.*
>
> *To this consideration we ought to ascribe the absence of any regulation respecting religion from the Magna Charta of our country.* To the guidance of the Ministers of the Gospel, this important object is, perhaps, more properly committed. It will be your [the Presbyterians'] care to instruct the ignorant and to reclaim the devious; And in the progress of morality and science, to which our Government will give every furtherance, we may confidently expect the advancement of true religion, and the completion of our happiness." * (Emphasis in original.)

There is one more document, written by Jefferson, which is particularly applicable to the State action under consideration in this case. It is a letter to Reverend Samuel Miller in 1808 on the subject of Presidential proclamations of days of thanksgiving, and it contains the following general comment:

> "Certainly, no power to prescribe any religious exercise, or to assume authority in religious discipline, has been delegated to the General Government * * * I do not believe it is for the interest of religion to invite the civil magistrate to direct its exercises, its disciplines or its doctrines; nor of the religious societies, that the General Government should be invested with the power of effecting any uniformity of time or matter among them. Fasting and praying are religious exercises; the enjoining them an act of discipline. Every religious society has a right to determine for itself the time for these exercises, and the subjects proper for them, according to their own particular tenets; * * * " **

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* Quoted in I STOKES, CHURCH AND STATE IN THE UNITED STATES, p. 537.

** I STOKES, *ibid.*, pp. 400-1.

In the present case, the New York officials would seem to have committed every single act condemned by the Founding Fathers in the statements quoted above. They have advocated belief in the existence of God, belief in a set form of worship and belief in the practice of asking God's blessings on behalf of the worshipper. They have composed and are now supervising and conducting, on a daily basis, a prayer incorporating those religious beliefs. They have attempted to justify their acts by stating that the promotion of those religious beliefs is in the interests of securing the peace and safety of our country, but in so doing they have merely compounded their original error by employing religion "as an engine of civil policy."

All of this, of course, is in addition to the fact that these same State officials, have, by making the saying of the Regents' Prayer a daily procedure in the schools of a local school district, utilized the compulsory school system and school buildings, facilities, supplies and personnel in the promotion of religious beliefs and the conduct of religious activities.

(h) The element of coercion present in this case is also stronger than that in *McCollum*.

The opinions of this Court in the *McCollum* case indicate that the only element of "coercion," "compulsion" or "pressure" present in that case lay in the impact of the "compulsory" public school system upon the program of religious instruction under consideration. The majority opinion, delivered by Mr. Justice Black, describes this element as follows (333 U. S. at pages 209-10):

> "The operation of the state's compulsory education system thus assists and is integrated with the program of religious instruction carried on by separate religious sects. Pupils compelled by law to go to school for secular education are released in part from their legal duty upon the condition that they attend the religious classes."

The concurring opinion of Mr. Justice Frankfurter, in which four Justices of the Court joined, is to the same effect (333 U. S. at page 227):

> "Religious education so conducted on school time and property is patently woven into the working scheme of the school. The Champaign arrangement thus presents powerful elements of inherent pressure by the school system in the interest of religious sects."

In this concurring opinion, there is also mention of another form of pressure, but it, too, is generated by the compulsory public school system (333 U. S. at page 227):

> "That a child is offered an alternative may reduce the constraint; it does not eliminate the operation of influence by the school in matters sacred to conscience and outside the school's domain. The law of imitation operates, and non-conformity is not an outstanding characteristic of children. The result is an obvious pressure upon children to attend."

In his separate concurring opinion, Mr. Justice Jackson took exception to the above-quoted comment. He saw no "legal compulsion" of any kind in the State action under consideration (333 U. S. at pages 232-3). *Yet, he, also, believed that such action was prohibited by the Establishment Clause.*

Needless to say, Mr. Justice Reed, who dissented, saw no element of coercion, compulsion or pressure (333 U. S. at pages 238-56).

The situation in the present case, petitioners respectfully submit, is little different from that in *McCollum*. If anything, the impact of the compulsory school system is stronger here, in at least three ways.

(1) In *McCollum*, the only "coercion" lay in the fact the pupils were compelled to attend school to obtain a secular education. They were not thereafter compelled to

participate in the program of religious instruction unless their parents requested that they do so. When they participated in the program of religious instruction, they were deemed to have been "released," and it was for that reason that the program was called a "released time" program (333 U. S. at page 222). In the present case, not only are the pupils compelled to attend school to obtain a secular education, but also, when they attend, they are compelled to participate in the saying of the Regents' Prayer, *unless their parents request that they be excused.* Here, the burden of taking action is on the parents of the pupils. If no action is taken, the pupils participate in the religious activity.

(2) In *McCollum*, the program of religious instruction was one of several classes which occurred during the school day, and it lasted for about 30-45 minutes (333 U. S. at pages 207-8). Those pupils who did not wish to participate in the program pursued their regular secular studies during that period (*ibid.* at page 209). In the present case, the Regents' Prayer is said in conjunction with the Pledge of Allegiance to the Flag. This is required by the resolution adopted by respondents on July 8, 1958 (R. 40), and it is recommended in the statement of belief adopted by the Regents on November 30, 1951 (R. 28). Moreover, the prayer contains only 22 words and takes less than one minute to say. Any pupil, therefore, who wishes to participate in the Pledge of Allegiance, but who does not choose to be present at the recitation of the prayer, must dash out of the classroom immediately after the Pledge of Allegiance and return in a matter of seconds. Under these circumstances, it is hardly surprising that although respondents have received requests that children be excused from saying the prayer, they have received none requesting that any child be excused from the classroom.

Both the timing and the brevity of the prayer, therefore, have the effect of encouraging some form of participation in its recitation even by those children who have been excused from saying it. They see and hear their teacher and classmates say the prayer. They have been excused from saying it, at the request of their parents, but nothing in the record indicates that they will be prohibited from saying it if they choose to do so. Petitioners respectfully submit that the "law of imitation" cited in the concurring opinion of Mr. Justice Frankfurter in the *McCollum* case (333 U. S. at page 227) is in full force and effect here.

(3) Most important of all, even more than the State action considered in *McCollum*, the State action being considered in this case necessarily exerts an influence on the minds of the children involved which cannot be avoided by any system of alternatives. Here, State educational officials charged with the duty of imparting knowledge to minor children have, in their official capacity, advocated religious beliefs. The same officials who teach children, and demand that the latter learn, that two plus two equals four and that "c-a-t" spells "cat", now say that there is a God, to Whom children should say a specified daily prayer, and from Whom children may ask, and expect to receive, blessings for themselves as well as others. Under these circumstances, petitioners respectfully submit, the effect on the children involved will be much the same whether they say the Regents' Prayer, or remain silent while it is said, or even if they leave the classroom or the school building during its recitation.

(i) The State action under consideration in this case rejects the belief concerning religion on which the "Founding Fathers" built.

The Board of Regents of the State of New York have stated that "[b]elief in and dependence upon Almighty God was the very cornerstone upon which our Founding Fathers builded" (R. 28). Petitioners disagree.

We are aware, of course, that belief in God exerted a strong influence on the thoughts and actions of many of the "Founding Fathers" in their personal lives, but we respectfully submit that another belief concerning religion dominated their thinking and conduct in the sphere of politics and government. We submit that the true cornerstone, or rather the "wall", on which they based their hope of creating a national government under which religion would flourish was "the wall of separation of Church and State."

That wall, we submit, the State action under consideration in this case threatens not merely to breach, but to undermine completely.

Conclusion

It is respectfully submitted that the decision of the Court of Appeals of the State of New York should be reversed and this case remanded to that Court with a direction to grant the relief requested in the original petition presented to the Special Term of the Supreme Court of the State of New York, Nassau County, together with such other and further relief as may be appropriate.

Respectfully submitted,

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Supreme Court of the United States

OCTOBER TERM, 1961

No. 468

In the Matter of the Application of

STEVEN I. ENGEL, DANIEL LICHTENSTEIN, MONROE LERNER, LENORE LYONS and LAWRENCE ROTH,

Petitioners,

—against—

WILLIAM J. VITALE, JR., PHILIP J. FREED, MARY HARTE, ANNE BIRCH and RICHARD SAUNDERS, constituting the Board of Education of Union Free School District Number Nine, New Hyde Park, New York,

Respondents,

directing them to discontinue a certain school practice,

—and—

HENRY HOLLENBERG, ROSE LEVINE, MARTIN ABRAMS, HELEN SWANSON, WALTER F. GIBB, JANE EHLEN, RALPH B. WEBB, VIRGINIA ZIMMERMAN, VIRGINIA DAVIS, VIOLET S. COX, EVELYN KOSTER, IRENE O'ROURKE, ROSE-MARIE PETELENZ, DANIEL J. REEHIL, THOMAS DELANEY and EDWARD L. MACFARLANE,

Intervenors-Respondents.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF NEW YORK

OBJECTIONS OF RESPONDENTS AND INTERVENORS-RESPONDENTS TO MOTION BY THE AMERICAN ETHICAL UNION FOR LEAVE TO FILE A BRIEF AS *AMICUS CURIAE*

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February 20, 1962

Supreme Court of the United States

OCTOBER TERM, 1961

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THE COURT OF APPEALS OF NEW YORK

OBJECTIONS OF RESPONDENTS AND INTERVENORS-RESPONDENTS TO MOTION BY THE AMERICAN ETHICAL UNION FOR LEAVE TO FILE A BRIEF AS *AMICUS CURIAE*

This litigation involves the validity under the First and Fourteenth Amendments to the United States Constitution of the "Regents' Prayer", a voluntary non-denominational prayer composed and recommended by the Board of Regents of the University of the State of New York and adopted for use in the public schools of Union Free School District No. 9, New Hyde Park, New York, pursuant to resolution adopted by respondent School Board on July 8, 1958. Each of the parties hereto has a direct and immediate interest in the outcome of the case and in the constitutional status of the Regents' Prayer. Petitioners, one of whom (Monroe Lerner) is a member of the Society for Ethical Culture, are taxpayers of the School District and the parents of children actually attending the public schools of the District (R. 11-12, 54).* Each of the intervenors-respondents is and, throughout the course of this litigation has been, a taxpayer of the district and a parent of children actually attending the schools of the district (R. 54). They are the parents of thirty-seven children attending the various schools of the district and these intervenors-respondents include members of the Hebrew, Protestant and Catholic faiths, and one (Evelyn Koster) who is a member of no organized church. Respondent School Board has an obvious interest in this litigation which will affect practices approved by it for non-compulsory use in its schools. The Board of Regents of the University of the State of New York has participated as *amicus curiae* throughout the

* Except as otherwise identified, references are to pages of the Record on Appeal submitted to this Court by petitioners in support of their petition for writ of certiorari.

litigation in the courts of New York, and has moved for leave to file a brief *amicus curiae* in this Court, because of its obviously direct interest in sustaining the constitutional validity of the Prayer, composed and recommended by it.

Respondents and intervenors-respondents oppose the application of the American Ethical Union for leave to file a brief *amicus curiae* in this Court. It should be noted that the arguments which this organization hopes to present are the allegedly sectarian nature of the Prayer and the claim of inherent psychological coercion upon dissenters (Motion, p. 3). These arguments have been thoroughly presented in the New York courts by counsel for petitioners and it is highly probable that such contentions will be reiterated in this Court. No claim is or can be made that counsel for petitioners are not fully competent in all respects to present these and other arguments to this Court.

As is true of the various other private organizations which have moved for similar permission, the American Ethical Union has no direct interest in this litigation and the fact that one of the petitioners is a member does not warrant the submission of an *amicus curiae* brief by this organization. Were this the case, numerous groups representing or purporting to represent all varieties of religious belief and experience would be entitled to similar treatment before this Court. Indeed, counsel for respondents have refused a number of similar requests by organizations affiliated with civic, religious or ethnic groups, some favoring the Prayer and others opposed to it.

It is our position, as expressed in previous objections to similar motions before this Court, that the orderly presentation of this case requires that participation be limited to parties having a direct interest in the constitutional status of the Regents' Prayer or having a right to file *amici*

curiae briefs under the Rules of this Court. The American Ethical Union has neither a direct interest in this litigation nor a right to participate under the Rules of this Court and it is therefore submitted that it should not be permitted to participae as *amicus curiae*.

It is therefore respectfully submitted that, under these circumstances, the wholesale filing of *amici* briefs by private organizations claiming some indirect interest in the litigation can serve no useful purpose and can lead only to unnecessary complications. For that reason it is respectfully submitted that the present motion by the American Ethical Union for leave to file a brief *amicus curiae* should be denied.

Dated: New York, New York
February 20, 1962

Respectfully submitted,

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OCTOBER TERM, 1961

NO. 468

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STEVEN I. ENGEL, DANIEL LICHTENSTEIN, MONROE LERNER, LENORE LYONS and LAWRENCE ROTH,

Petitioners,

—against—

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Respondents,

directing them to discontinue a certain school practice,

—and—

HENRY HOLLENBERG, ROSE LEVINE, MARTIN ABRAMS, HELEN SWANSON, WALTER F. GIBB, JANE EHLEN, RALPH B. WEBB, VIRGINIA ZIMMERMAN, VIRGINIA DAVIS, VIOLET S. COX, EVELYN KOSTER, IRENE O'ROURKE, ROSE-MARIE PETELENZ, DANIEL J. REEHIL, THOMAS DELANEY and EDWARD L. MacFARLANE,

Intervenors-Respondents.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF NEW YORK

OBJECTIONS OF RESPONDENTS AND INTERVENORS-RESPONDENTS TO MOTION BY THE SYNAGOGUE COUNCIL OF AMERICA AND NATIONAL COMMUNITY RELATIONS ADVISORY COUNCIL FOR LEAVE TO FILE A BRIEF *AMICI CURIAE*

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Dated: New York, New York
February 16, 1962

Supreme Court of the United States

OCTOBER TERM, 1961

No. 468

In the Matter of the Application of

STEVEN I. ENGEL, DANIEL LICHTENSTEIN, MONROE LERNER, LENORE LYONS and LAWRENCE ROTH,

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—against—

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Intervenors-Respondents.

ON WRIT OF CERTIORARI TO
THE COURT OF APPEALS OF NEW YORK

OBJECTIONS OF RESPONDENTS AND INTERVENORS-RESPONDENTS TO MOTION BY THE SYNAGOGUE COUNCIL OF AMERICA AND NATIONAL COMMUNITY RELATIONS ADVISORY COUNCIL FOR LEAVE TO FILE A BRIEF *AMICI CURIAE*

This litigation involves the validity under the First and Fourteenth Amendments to the United States Constitution of the "Regents' Prayer", a voluntary nondenominational prayer composed and recommended by the Board of Regents of the University of the State of New York and adopted for use in the public schools of Union Free School District No. 9, New Hyde Park, New York, pursuant to resolution adopted by respondent School Board on July 8, 1958. Each of the parties hereto has a direct and immediate interest in the outcome of the case and in the constitutional status of the Regents' Prayer. Petitioners, two of whom are of the Jewish faith, are taxpayers of the School District and the parents of children actually attending the public schools of the District (R. 11-12, 54).* Each of the intervenors-respondents is and, throughout the course of this litigation has been, a taxpayer of the district and a parent of children actually attending the schools of the district (R. 54). They are the parents of thirty-seven children attending the various schools of the district and these intervenors-respondents include members of the Hebrew, Protestant and Catholic faiths, and one (Evelyn Koster) who is a member of no organized church. Respondent School Board has an obvious interest in this litigation which will affect practices approved by it for non-compulsory use in its schools. The Board of Regents

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* Except as otherwise identified, references are to pages of the Record on Appeal submitted to this Court by petitioners in support of their petition for writ of certiorari.

of the University of the State of New York has participated as *amicus curiae* throughout the litigation in the courts of New York, and has moved for leave to file a brief *amicus curiae* in this Court, because of its obviously direct interest in sustaining the constitutional validity of the Prayer, composed and recommended by it.

Respondents and intervenors-respondents presently oppose the application of the Synagogue Council of America and the National Community Relations Advisory Council for leave to file a brief *amici curiae* in this Court. It is clear from the moving papers that these organizations have no direct interest in this litigation. They do not base their request for participation on the ground that they represent taxpayers within the School District or that they represent any parents of children actually attending the schools of the District. Neither do they demonstrate that they are actively interested in any pending cases involving analogous issues, the outcome of which may be directly or immediately influenced by this Court's determination of the validity of the Regents' Prayer. The arguments which the moving organizations hope to present are the allegedly sectarian nature of the Prayer and the claim of inherent psychological coercion (Motion, pp. 4-5). These arguments have been thoroughly presented in the New York courts by counsel for petitioners and it is highly probable that such contentions will be reiterated in this Court. No claim is or can be made that counsel for petitioners are not fully competent in all respects to present these and other arguments to this Court.

In short, the moving organizations seek to participate because of a general interest in the judicial construction of the First Amendment. It is submitted that this general

interest is not a sufficient basis for permitting such participation especially where there are many other organizations representing diverse civic, educational or religious groups which may seek or have sought on the basis of a similar general interest, to file *amicus curiae* briefs either in support of or in opposition to the Prayer. It should be emphasized that counsel for respondents and for intervenors-respondents do not confine their opposition to the present motion. Since the granting of the petition for certiorari in this case, they have refused requests by a number of organizations, some favoring the Prayer and others opposed to it, seeking to participate as *amici curiae*.

It is our position that the orderly presentation of this case requires that participation be limited to parties having a direct interest in the constitutional status of the Regents' Prayer or having a right to file *amici curiae* briefs under the Rules of this Court. The Synagogue Council of America and the National Community Relations Advisory Council have neither a direct interest in this litigation nor a right to participate under the Rules of this Court and it is therefore submitted that they should not be permitted to participate as *amici curiae*.

It is therefore respectfully submitted that, under these circumstances, the wholesale filing of *amici* briefs by private organizations claiming some indirect interest in the litigation can serve no useful purpose and can lead only to unnecessary complications. For that reason it is respectfully submitted that the present motion by the Synagogue Council of America and the National Community Relations Advisory Council for leave to file a brief *amici curiae* should be denied.

Dated: New York, New York
February 16, 1962

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No. 468

In the Matter of the Application
of
STEVEN I. ENGEL, DANIEL LICHTENSTEIN, MONROE LERNER, LENORE LYONS and LAWRENCE ROTH,

Appellants,

against

WILLIAM J. VITALE, JR., PHILIP J. FREED, MARY HARTE, ANNE BIRCH and RICHARD SAUNDERS, constituting the Board of Education of Union Free School District Number Nine, New Hyde Park, New York,

Respondents,

directing them to discontinue a certain school practice

and

HENRY HOLLENBERG, ROSE LEVINE, MARTIN ABRAMS, HELEN SWANSON, WALTER E. GIBB, JANE EHLES, RALPH B. WEBB, VIRGINIA ZIMMERMAN, VIRGINIA DAVIS, VIRGILE S. COX, EVELYN KOSTER, IRENE O'ROURKE, ROSEMARIE PETTELENZ, DANIEL J. REILLY, THOMAS DELANEY and EDWARD J. MACFARLANE,

Intervenors-Respondents.

BRIEF OF AMERICAN JEWISH COMMITTEE AND ANTI-DEFAMATION LEAGUE OF B'NAI B'RITH AS *AMICI CURIAE*

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IN THE

Supreme Court of the United States

October Term, 1961

No. 468

In the Matter of the Application

of

STEVEN I. ENGEL, DANIEL LICHTENSTEIN, MONROE LERNER, LENORE LYONS and LAWRENCE ROTH,

Appellants,

against

WILLIAM J. VITALE, JR., PHILIP J. FEUD, MARY HARTE, ANNE BIRCH and RICHARD SAUNDERS, constituting the Board of Education of Union Free School District Number Nine, New Hyde Park, New York,

Respondents,

directing them to discontinue a certain school practice

and

HENRY HOLLENBERG, ROSE LEVINE, MARTIN ABRAMS, HELEN SWANSON, WALTER E. GIER, JANE EHLEN, RALPH B. WEBB, VIRGINIA ZIMMERMAN, VIRGINIA DAVIS, VIOLET S. COX, EVELYN KOSTER, IRENE O'ROURKE, ROSEMARIE PETTERSZ, DANIEL J. KELLEHIL, THOMAS DELANEY and EDWARD L. MACFARLANE,

Intervenors-Respondents.

BRIEF OF AMERICAN JEWISH COMMITTEE AND ANTI-DEFAMATION LEAGUE OF B'NAI B'RITH AS *AMICI CURIAE*

Interest of the *Amici*

The American Jewish Committee, founded in 1906, was incorporated by Act of the Legislature of the State of New York in 1911. Its Charter states:

> The objects of this corporation shall be, to prevent the infraction of the civil and religious rights of Jews, in any part of the world; to render all lawful assistance and to take appropriate remedial action in the event of threatened or actual invasion or restriction of such rights, or of unfavorable discrimination with respect thereto * * *

B'nai B'rith, founded in 1843, is the oldest civic service organization of American Jews, which represents a membership of more than 350,000 men and women and their families. The Anti-Defamation League was organized in 1913 as a section of the parent organization to advance goodwill and proper understanding between Americans and translate into greater effectiveness the ideals of American democracy. It is, therefore, dedicated to the protection of freedom of religion and combatting religious discrimination.

It has been among the fundamental tenets of the organizations which appear as *amici curiae* herein that the welfare and the security of members of minority religious groups in the United States depend upon the preservation of constitutional guarantees for all; that an invasion of the rights of any religious group is ultimately a threat to the religious freedom of all groups and to the individual members thereof.

This case places in issue the constitutionality under the First Amendment of prayer as part of the opening exercise in the public schools of the State of New York. We deem it appropriate, at this point, to state that the constituency of both of the *amici* includes vast numbers of people who not only believe in the existence of God, but devoutly worship Him. The constituency of the *amici* be-

lieve however that prayer, in our democratic society, is a matter for the home, synagogue and church, and not for the public schools. They wholeheartedly support the First Amendment to the United States Constitution and its underlying public policy which requires separation of church and state in the interest of both. Hence, they are concerned with the decision of the New York Court of Appeals upholding the constitutionality of the recitation of the Regents' prayer in the public schools of New Hyde Park.

The New York State Board of Regents by sponsoring prayer in the public schools and recommending its specific form, sought to satisfy the demands of certain segments in our society which insist on the introduction of religious practices in the public schools, concededly out of good motives. The Board of Regents hoped that a prayer could be devised which would be unobjectionable to all three major religious faiths and still meaningful in terms of teaching a reverence for the Creator. The danger inherent in this process is that a state agency undertook to evaluate the spiritual needs of the student population of the public schools and to establish the means to satisfy such needs. This tends to belittle creedal differences and to establish a form of "public school religion" or "least common denominator religion".

Freedom of religious belief, observance and worship can remain inviolate only so long as there is no intrusion of religious authority in secular affairs or secular authority in religious affairs. Each breach in this separation of role and function tends to beget additional breaches and, hence, the American Jewish Committee and the Anti-Defamation League of B'nai B'rith are opposed to any and all forms

of establishment of religion by which a state agency undertakes to provide for the religious needs of children.

For these reasons, the two organizations join in filing this brief *amici curiae* with the permission of this Court.

Statement of the Case

On November 30, 1951, the New York State Board of Regents, the agency charged by the Education Law with supervision of the school system of the State, adopted a Statement on moral and spiritual training in the schools. That Statement, a copy of which is annexed as Appendix "A" for the convenience of the Court, recommended that the Pledge of Allegiance at the commencement of each school day "might well be joined with this act of reverence to God: 'Almighty God, we acknowledge our dependence upon Thee, and we beg Thy blessings upon us, our parents, our teachers and our country.' "

At a meeting of the Board of Education, Union Free School District Number Nine, New Hyde Park, New York, held on July 8, 1958, a motion was duly made and carried that the Board of Education direct the district principal to institute the Regents' prayer as a daily procedure to follow the Pledge of Allegiance.

A proceeding under Article 78 of the Civil Practice Act was instituted by five taxpayers whose children attended the public schools in District Number Nine, for an order directing the members of the Board of Education to discontinue the recitation of the Regents' prayer in the local public schools. Sixteen taxpayer parents who opposed the petition were granted permission to intervene to argue the issues arising under the United States and New York Constitutions.

Mr. Justice Bernard S. Meyer, at Supreme Court, Special Term, Nassau County, decided on August 24, 1959, that the Establishment Clause of the First Amendment does not bar the Regents' prayer from the public schools, but that the Free Exercise Clauses of the Federal and State Constitutions require that children whose parents object to their participation be excused. To achieve this objective, Mr. Justice Meyer required that notice to the parents specify the wording of the prayer and the procedure to be followed when the prayer is recited, to enable the parents to make a conscious choice whether or not to permit their children to participate in the religious exercise. Regulations to be adopted by the School Board were also to make it clear that neither teachers nor other school authorities might comment on participation or non-participation of the students, nor suggest the assumption of any posture in connection with the prayer. The Board was required to provide facilities for those children whose parents requested that they be excused from the room during the recitation of the Regents' prayer. Mr. Justice Meyer, in the exercise of his equitable jurisdiction, denied the petition but remanded the matter to the School Board for further proceedings not inconsistent with his opinion. *Engel* v. *Vitale*, 18 Misc. 2d 659.

Petitioners appealed to the Appellate Division, Second Department, which, on October 17, 1960, affirmed the order of Mr. Justice Meyer in a *per curiam* opinion. In a separate opinion Mr. Justice Beldock concurred in part and dissented in part. *Engel* v. *Vitale*, 11 App. Div. 2d 340.

The Supreme Court, Nassau County, after receiving an affidavit from the President of the Board of Education of Union Free School District Number Nine, advising the

Court that the Board's resolution and regulations had been amended in accordance with the Court's opinion, on March 17, 1961 entered a final order dismissing the proceeding on the merits. An appeal therefrom was taken to the New York Court of Appeals pursuant to the provision of Sections 588 and 590 of the Civil Practice Act.

By a 5 to 2 division the Court of Appeals affirmed the final order of the Supreme Court, Nassau County. *Engel* v. *Vitale*, 10 N. Y. 2d 174. This Court granted the petition for a Writ of *Certiorari* on December 4, 1961.

The Question Presented

This case presents this Court with the question whether the recital of a prayer composed by state authority and required by a local school board as part of the opening exercise in the public schools at the beginning of each school day violates the Establishment Clause of the First Amendment of the United States Constitution.

Summary of Argument

The action of a local Board of Education, directing the inclusion of the Regents' prayer in the opening exercise in the public schools, constitutes an establishment of religion in violation of the First Amendment of the United States Constitution. This Amendment, as interpreted by the United States Supreme Court, prohibits state as well as Federal agencies from aiding one or all religions, from using the public schools for religious exercises, or from blending secular and religious instruction.

The doctrine that public schools may adjust their program to accommodate the needs of sectarian groups to schedule their programs of religious education off school premises does not apply to this case. Provision for the excuse of pupils whose parents object to their participation in the school-sponsored religious exercise does not save this practice from its constitutional invalidity.

The contention that prayer in public schools could be upheld because it has been traditional in some school systems is not dealt with in this brief. It is our view that such a contention can no more justify practices which are in violation of the clear meaning of the First Amendment than the tradition of racial segregation in the South can safeguard those practices from attack under the Equal Protection Clause of the Fourteenth Amendment.

ARGUMENT

The resolution of a public school board directing the recitation of a prayer as a daily procedure in the public schools violates the constitutional prohibition against an establishment of religion.

A. The Establishment of Religion Clause of the First Amendment

The First Amendment to the United States Constitution provides, in part, as follows:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof * * *

This provision against action by Congress has been held equally applicable to action by the states or any of their

political subdivisions. *Cantwell* v. *Connecticut*, 310 U. S. 296 (1940); *Murdock* v. *Pennsylvania*, 319 U. S. 105 (1943).

The Establishment of Religion Clause has been defined by this Court in *Everson* v. *Board of Education*, 330 U. S. 1 (1947), as follows:

> The "establishment of religion" clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or nonattendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and vice versa. In the words of Jefferson, the clause against establishment of religion by law was intended to erect "a wall of separation between Church and State." *Id.* at 15-16.

There was no disagreement between the majority and minority opinions in *Everson* concerning that definition. This Court noted such agreement in *McCollum* v. *Board of Education*, 333 U. S. 203, 211 (1948) and in *Torcaso* v. *Watkins*, 367 U. S. 488, 493 (1961). Whether or not this definition of the Establishment Clause was *obiter dictum* in *Everson*, it indisputably became the *ratio decidendi* in *McCollum*, as acknowledged by this Court's opinion in *Torcaso*. This

definition of establishment was reaffirmed in the opinion of the Chief Justice in *McGowan* v. *Maryland*, 366 U. S. 420, 443 (1961) and in *Torcaso, supra*, at 492-3.

By the frequent reassertion of this broad definition of the Establishment Clause, this Court has repeatedly rejected all efforts, such as by the New York Court of Appeals in its decision below, to narrow or restrict the meaning of that clause to "official adoption of, or favor to, one or more sects". *Engel* v. *Vitale*, 10 N. Y. 2d 174, 180. A similar effort by a state court to narrow and restrict the meaning of the Establishment Clause was rejected by this Court in *Torcaso*.

B. The *McCollum* decision controls this case.

McCollum made the definition of the Establishment Clause as spelled out in *Everson* the basis for a determination that a released time program in the public schools of Champaign, Illinois, violated the First Amendment. Under that program, children attending public schools, whose parents so requested, were released for a thirty or forty-five minute period each week, during the regular school time, to receive religious instruction by sectarian teachers. Such classes were conducted in the regular classrooms of the school building. Students whose parents did not wish them to participate in the religious instruction were not required or permitted to remain in the classroom where such instruction took place. Instead, they were assigned another place in the public school building for the pursuit of their secular studies. *McCollum* v. *Board of Education, supra*, at 207-209.

The program in the public schools of Champaign, involved in *McCollum*, may be characterized by these elements:

1. It was a religious program;

2. The public school classrooms were used;

3. The regular public school time was used; and

4. Participation was limited to children whose parents consented.

This Court, in an eight-to-one decision, held this Champaign program unconstitutional under the Establishment Clause of the First Amendment. The Court concluded that "the foregoing facts * * * show the use of tax-supported property for religious instruction * * *" *Id.* at 209. Such use of "tax-supported property" was a violation of the prohibition against laws "which aid one religion, aid all religions, or prefer one religion over another."

The public school program in issue in this case was described by the trial court as "said aloud at the commencement of the school day, by each class, in the classroom in the presence of a teacher." 18 Misc. 2d at 670. The prayer followed the salute to the flag. Children who did not wish to participate, were not required to do so.

Thus, it is clear that the significant features of the Champaign program struck down by this Court in *McCollum* and listed above, are also present in this case:

1. It is a religious program;

2. The public school classrooms are used;

3. The regular public school time is used; and

4. Participation is limited to children whose parents consent.

Both the trial court and the court below based their decision on the premise that the recital of the Regents' prayer was not religious instruction or education. Both conceded that religious instruction or education in the public schools would be clearly unlawful.

We submit that the clear purpose as well as the effect of requiring recital of a prayer as part of the public school's opening exercises, is instruction of the children that Almighty God is their Creator, that they must acknowledge their dependence upon Him and beg His blessings upon them, their parents, their teachers and the United States. Just as the Pledge of Allegiance and the singing of the national anthem—also part of the opening exercises—are intended to inculcate in the children a deep sense of loyalty and patriotism and to instruct them in their duties and obligations to our country, so, too, the recital of the prayer is intended to instruct the children in that love for God, for parents and for home which is the mark of "true character training". Regents' Statement, Appendix "A".

There can be no doubt that the purpose of commencing the school day with the Regents' prayer is to teach the children committed to the care of the public school that "respect for lawful authority and obedience", as taught by the school, is predicated upon "belief in and dependence upon Almighty God." *Ibid.* Such is its express purpose, and there would be no point to the exercise were it otherwise.

It is now generally accepted that the pupil is being and should be subjected to a learning experience during the entire period that he is entrusted to the public school—from the assembly in the school yard to final dismissal. This learning experience is not limited to the substantive content of classroom instruction in specific subjects, but embraces the total program of the school day, in all its varied aspects.

including opening exercises, teacher attitudes, behavior in the classrooms and assemblies and at lunch, interrelationships with teachers and classmates, special drills such as air raid and fire drills, and even appropriate attire. Educational Policies Commission, National Education Association of the United States and American Association of School Administrators, *Moral and Spiritual Values in Public Schools*, Washington, D. C., 1951, pp. 58-59.[1] How, then, can the recital of the Regents' prayer in the classroom be isolated from the total learning experience and regarded as something non-instructional in character? If, as the trial court believed, prayer in our public schools is "traditional", it is no less instructional albeit "traditional".

Apart from the instructional nature of the Regents' prayer, clearly it is a religious rite. All prayer is communication with and appeal to the Creator; it is the most fundamental expression of religious faith.[2]

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1. See also, Caswell, Hollis L., & Campbell, Doak S., *Curriculum Development*, American Book Co., New York, 1935, p. 69; Counts, George S., "Education", III *Encyclopedia of the Social Sciences* (reissued ed.) 1937, p. 413; Goslin, William E., "Responsibilities of American Education", *Freedom and Public Education*, Praeger, New York, 1953, p. 47; Quillen, I. James, "The Curriculum and the Attacks on the Public Schools", *Public Education in America*, Harper & Bros., New York, 1958, p. 119; Stratemeyer, Florence, & others, *Developing a Curriculum for Modern Living*, Columbia University, 2nd ed., 1957, pp. 661-2.

2. The Talmud, commenting on *Deut.* 11:13, describes prayer "as the 'divine service of the heart'. It is often regarded as superior to all other sacrifices. God loves prayer, especially that of the pious man; but it must be performed in the right spirit, not as a fixed task that has to be done, but as a fervent pouring out of the soul of the pious man which comes from the heart which is truly moved. The worshipper must feel that he is standing in holy awe before the majesty of God * * * One should enter upon prayer in the spirit of deepest humility and holy reverence, and one should pray only when one has a longing to do so in one's own heart and is attuned to it by reason of a devotional mood." 8 *Universal Jewish Encyclopedia* "Prayer" 618.

Whether the Regents' prayer is deemed instructional or merely devotional or, as we believe, both, it is clearly an act of religion, as conceded by the Chief Judge in the court below—"The 'Regents prayer' is an acknowledgment of our dependence upon Almighty God and a petition for the bestowal of His blessings." 10 N. Y. 2d at 180. If carried on in the public school building during regular school hours such prayer thus constitutes aid to one or all religions and violates the Establishment Clause as interpreted by this Court in *McCollum*. In fact, the involvement of the public school authorities in religion is even more apparent and pervasive in the case of the Regents' prayer than in the Champaign released time program. The practice here in issue is an official school activity over which the classroom teacher presides. The prayer in question was composed, endorsed and promoted by the Board of Regents, a state authority. This prayer and the Pledge of Allegiance are parts of the opening exercise, which blends religious and secular concerns and commingles God and Caesar.[3] In contrast, the practice struck down in *McCollum* involved religious instruction by non-public school teachers in separate rooms with the public school teacher not in control of the class. *McCollum* v. *Board of Education*, *supra*, at 208.

Bible reading, in conjunction with the recitation of the Lord's Prayer and the Pledge of Allegiance, as an opening public school exercise, was recently held to be "a religious ceremony" and hence unconstitutional under the Establishment Clause of the First Amendment, notwithstanding statutory provision for the excuse of children whose parents request it. *Schempp* v. *School District of Abington Township*, U. S. D. C. E. Pa., February 5, 1962; 30 U. S. L. W. 2380.

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3. From Mr. Justice Jackson's dissenting opinion in *Zorach* v. *Clauson*, 343 U. S. 306, 325 (1952).

When the same case was previously before the three-judge statutory court, it said that:

> The addition of the Flag Salute to the ceremony cannot be deemed to detract from the devotional quality of the morning exercises. Our backgrounds are colored by our own experiences and many of us have participated in such exercises as those required in the Abington Township schools in our childhood. We deemed them then and we deem them now to be devotional in nature, intended to inculcate religious principles and religious beliefs. *Schempp* v. *School District of Abington Township*, 177 F. Supp. 398, 406 (1959).

It is true that the prayer involved in *Schempp* was the Lord's Prayer and not the Regents' prayer. But just as the Lord's Prayer is acceptable to some and objectionable to others, so, too, the Regents' prayer is acceptable to some and objectionable to others.[4]

In the whole history of mankind, no one has thus far been able to formulate any single means of communicating with God in a manner acceptable to all men, which would be required to render it truly "non-sectarian". It was this impossibility of securing agreement on matters of religious faith that led the framers of the First Amendment to insist upon the separation of the institutions of the state from those of the various religions.

C. The *Zorach* decision is not controlling.

This Court's interpretation of the meaning of "establishment of religion", as set forth in *McCollum*, *supra*, was in no way weakened by its subsequent decision in *Zorach* v. *Clauson*, 343 U. S. 306 (1952). In upholding the New York

4. For discussion of specific religious objection to the Regents' prayer, see pp. 20-21, *infra*.

released time program in that case, this Court distinguished the facts from those in the *McCollum* case, since the New York program did not involve use of public school buildings for religious instruction. The Court expressly endorsed the principle enunciated in *Everson* and *McCollum*—"We follow the *McCollum* case." 343 U. S. at 315. This was reaffirmed in *Torcaso* v. *Watkins*, *supra*, at 494.

That the New York released time program was upheld in *Zorach* while the Champaign program invalidated in *McCollum* was explained by this Court as a result of the factual differences between the two released time programs, *Zorach* v. *Clauson*, *supra*, at 315; *Zorach* was not a "retreat" from *McCollum*, as interpreted by the trial court, 18 Misc. 2d at 688.

In his opinion in *Zorach*, Mr. Justice Douglas reiterated "that the First Amendment reflects the philosophy that Church and State should be separated." Insofar as both the free exercise of religion and the establishment of religion are concerned, "the separation must be complete and unequivocal. The First Amendment within the scope of its coverage permits no exception; the prohibition is absolute." *Id.* at 312. This Court held the New York released time program not violative of the First Amendment because such program did not involve any use of the public schools to promote religious worship or instruction. The only role played by the school was to "close its doors or suspend its operations as to those who want to repair to their religious sanctuary for worship or instruction." *Id.* at 314. Or, as the Court expressed it elsewhere, all that was done by the public schools in New York was to make "adjustments of their schedules to accommodate the religious needs of the people." *Id.* at 315.

This reasoning, supporting the *Zorach* holding, is inapplicable to the case at bar. First, the Board of Regents

presumed to act as an ecclesiastical authority in devising and composing a prayer. Second, this prayer is recited within the public school buildings. Third, far from merely "closing its doors" to accommodate those wishing to participate in outside religious activities, the school authorities themselves sponsor the Regents' prayer, which becomes an integral part of the daily public school program under the guidance and control of the teacher. Fourth, the opening exercise blends secular (Pledge of Allegiance) and religious (Regents' prayer) programs, a combination condemned in *Zorach*. *Id.* at 314. Finally, the Regents' prayer constitutes "religious instruction" undertaken by the government, also condemned in *Zorach*. *Ibid.*

Mr. Justice Meyer in his opinion in the trial court used the concept of "accommodation" (18 Misc. 2d at 693) to justify upholding the Regents' prayer. In doing so, he expanded the concept far beyond the meaning given it by this Court. "Accommodation" cannot be used as an open-sesame to introduce all kinds of religious practices into the public schools; its meaning must be understood in light of the factual situation discussed in *Zorach*, or the constitutional prohibition on establishment will lose all its substance.

D. The program is unconstitutional even though objecting children may be excused.

This Court has recognized the distinction between the Establishment Clause and the Free Exercise Clause of the First Amendment. *Zorach* v. *Clauson*, *supra*, at 310-312; *McGowan* v. *Maryland*, *supra*, at 430. This difference is particularly striking when we consider the effect on the constitutionality of a provision for the non-participation of

objecting pupils. It may be argued that permission for non-participation makes a religious program innocuous from the point of view of the free exercise of religion. However, the presence or absence of compulsory attendance is irrelevant in any discussion of the constitutionality of a program under the Establishment Clause. This clause of the First Amendment prohibits any agency of the state from undertaking or sponsoring religious programs, and it is of no moment that all or some of the citizens participate in such programs. Clearly, the holding of a Mass in a public school during the regular day would violate the Establishment Clause even though all non-Catholic pupils were permitted or required to absent themselves.

This point is illustrated in the *McCollum* case. There, the Champaign released time program was invalidated under the Establishment Clause even though there was no question of compelling any child to participate in the religious indoctrination. On the contrary, only children whose parents signed consent cards were released from their secular studies to receive religious instruction. *McCollum* v. *Board of Education*, *supra*, at 207.

Mr. Justice Meyer, in his opinion in the trial court, ignored this vital distinction between the Establishment and the Free Exercise Clauses. He objected to the mandatory terms of the Board's resolution setting up the Regents' prayer program, and required the Board to provide expressly for the choice of non-participation by those children whose parents disapproved on religious grounds. While this requirement might save the program from a constitutional attack under the Free Exercise Clause, it cannot save it under the Establishment Clause. Once it is conceded that the program deliberately brings a religious practice into the

public schools it is a violation of the Establishment Clause and remains so notwithstanding provision for non-participation.

One of the vices of the Regents' program for the inclusion of a prayer in the opening school exercises, notwithstanding provision for non-participation, is the fact that the program places the "stamp of approval" of the state on the religious ceremony. *Tudor* v. *Board of Education of Rutherford*, 14 N. J. 31, 51 (1953). This has the effect of coercing public school children to participate in a religious rite, just as the released time program in Champaign "had the effect of coercing the children to attend religious classes". *McGowan* v. *Maryland*, *supra*, at 452. See also, Mr. Justice Frankfurter's concurring opinion in *McCollum*, *supra*, at 230.

The non-participating children are inevitably set apart as non-conformists and subjected to social and psychological pressure to modify their beliefs and conduct. The choices open to the non-participating child are all bad: he may ask to be excused and hence label himself as a non-conformist to his classmates; he may yield to the pressure and participate in the exercise despite the conflict with his beliefs.

The dilemma in which the child is thus placed is not of his own creation; it is created for him by the resolution of the Board to conduct religious prayer as part of the public school program. To consider the "obvious pressure" thus exerted upon public school children as beyond the Court's cognizance, is "to draw a thread from a fabric". *Id.* at 227, 230. It fails to accept the fact that the public school authorities, by deliberately introducing a religious exercise, are responsible for imposing the dilemma upon children who have been committed to their care solely for secular education.

Several state courts, when called upon to consider various religious practices in the public schools, have held that provision for non-participation did not save a school-sponsored religious program from invalidity under state constitutional provisions which had the same objectives as the First Amendment.

> The exclusion of a pupil from this part of the school exercises in which the rest of the school joins, separates him from his fellows, puts him in a class by himself, deprives him of his equality with the other pupils, subjects him to a religious stigma and places him at a disadvantage in the school, which the law never contemplated. All this is because of his religious belief. If the instruction or exercise is such that certain of the pupils must be excused from it because it is hostile to their or their parents' religious belief, then such instruction or exercise is sectarian and forbidden by the Constitution. *People ex rel. Ring* v. *Board of Education*, 245 Ill. 334, 351 (1910).
>
> It is said, if reading the Protestant version of the Bible in school is offensive to the parents of some of the scholars, and antagonistic to their own religious views, *their children can retire.* They ought not to be compelled to go out of the school for such a reason, for one moment. The suggestion itself concedes the whole argument. *State ex rel. Weiss* v. *District Board*, 76 Wisc. 177, 219, 220 (1890). (Emphasis in original.)
>
> And excusing such children on religious grounds, although the number excused might be very small, would be a distinct preference in favor of the religious beliefs of the majority, and would work a discrimination against those who were excused. The exclusion of a pupil under such circumstances puts him in a class by himself; it subjects him to a religious stigma; and all because of his religious belief. *Herold* v. *Parish Board of School Directors*, 136 La. 1034, 1050 (1915).

It is submitted that the case at bar cannot be distinguished from the cases cited above, on the theory that they involved sectarian practices, whereas the Regents' prayer is supposedly non-sectarian. Quite apart from the position of agnostics and atheists, to whom all appeals to Divine Providence are obviously sectarian,[5] prayer, as a central institution of each of the major Western religions, has a separate and distinct meaning for the adherents of each sect and denomination of such religions. This is true with respect to the forms and content of prayer.[6] It is also true with respect to the demeanor required of the supplicant

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5. That non-believers are entitled to the protection of the First Amendment is beyond dispute. *Everson* v. *Board of Education*, *supra* at 15, 18; *West Virginia State Board of Education* v. *Barnette*, 319 U. S. 624, 642 (1943); *McCollum* v. *Board of Education*, *supra* at 210; *Torcaso* v. *Watkins*, *supra*.

6. "He who changes the form of the prayers as decreed by the Sages has not properly fulfilled his religious obligations", *Babylonian Talmud, B'rachot*, 40b; "Change not the form of the prayer", *Jerusalem Talmud, B'rachot*, Chapter 5, Halacha 2, p. 9b (Krotoshin ed.); "Rav Nachshon [*circa* 8th cent.] wrote: one does not make any change in the prayers ordained by the Sages", *Commentary on the Sh'iltot* (Berlin mss.) published by Epstein, J. N., in *Revue des Etudes Juives* (1922) Vol. 55, p. 184; "The form of all blessings was decreed by Ezra the Scribe and his court, and ought not either to be changed nor added to nor diminished from, and whosoever changes the form of blessings decreed by the Sages is most certainly in error", Maimonides, *Mishna Torah, Sefer Ha'Ahavah, Hilchot B'rachot*, Chapter 1, par. 5; "As a general rule, one who changes the form of prayers as decreed by the Sages, most certainly is in error, and must repeat the prayers according to the proper form", Maimonides, *Mishna Torah, Sefer Ha'Ahavah, Hilchot K'ri'at Sh'ma*, Chapter 1, par. 7.

"The significance of the prayers consists not alone in their content but also in their traditional forms, in the verbiage in which they have been bequeathed to us, hence, also in the Hebrew language. This must remain, therefore, with few exceptions, the language of prayer", Geiger, Abraham, *Israelitisches Gebetbuch*, (Jewish Prayer-book) quoted by Philipson, David, *Centenary Papers*, Cincinnati (1919) p. 124.

while he is praying. To a deeply religious person, these differences may go to the root and essence of his religion. It may be that the Regents' prayer, in its form and content, is not objectionable to a number of sects and denominations, perhaps even to a majority; but it is a form of prayer not known or accepted in the homes, synagogues and churches of many children attending the public schools of New York. A confusion is thus created in the minds of many children who are exposed to one form of religious experience at home, synagogue or church and subjected to a different form in public school.[7]

This is particularly true of the adherents of orthodoxy[8] in all religions which is characterized by strict maintenance of old established forms of worship. In the view of adherents of orthodox religions, any prayer which deviates from accepted forms is objectionable. There is no prayer which has been universally accepted by all Western religions as to form and content.

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7. The problems which the public school authorities have to tackle in a futile effort to regulate the saying of the Regents' prayer while at the same time seeking to protect the constitutional rights of all children, is illustrated in this case by the disagreement between Mr. Justice Meyer in the trial court and Mr. Justice Beldock in the Appellate Division of the New York Supreme Court, 11 A. D. 2d 340, 348-9, in their respective opinions as to the conduct that should be required of the non-participants. It was to eliminate conflicts of this type that the First Amendment was adopted. II Madison, 186-191, para. 11; *McCollum* v. *Board of Education*, *supra* at 212, 216-17.

8. Orthodoxy is defined as "conformity to an official formulation of truth especially in religious belief or practice." *Webster's Third New International Dictionary*, G. & C. Merriam Co., Springfield, Mass., 1961, p. 1594.

E. The recent decisions of this Court in the Sunday Closing Law cases strengthen the conclusion that the Regents' prayer is unconstitutional.

On May 29, 1961 this Court ruled on the constitutionality of a series of state statutes prohibiting certain business and and labor activities on Sunday. These statutes were attacked as unconstitutional under the First and Fourteenth Amendments. One of the grounds urged upon this Court was that these acts were religious legislation and hence constituted an establishment of religion.

The Chief Justice, speaking for the Court in *McGowan* v. *Maryland*, *supra*, conceded that these Sunday closing laws were religious in their origin. He held, however, that they had lost their religious character, had become secular legislation, and therefore "presently they bear no relationship to establishment of religion as those words are used in the Constitution of the United States." *Id.* at 444.[9] He added that Sunday legislation would violate the Establishment Clause if it could be "demonstrated that its purpose—evidenced either on the face of the legislation, in conjunction with its legislative history, or in its operative effect—is to use the State's coercive power to aid religion." *Id.* at 453.

While in the case at bar there is no legislative act, only administrative action by agencies of the state, this distinction is not material. *McCollum* v. *Board of Education*, *supra*. It is respectfully submitted that the Regents' prayer, which is at issue in this case, has a religious purpose, as documented by the Regents Statement (Appendix "A") and, as has already been shown, is religious in its effect.

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9. See also *Gallagher* v. *Crown Kosher Super Market*, 366 U. S. 617, 630, and *Braunfeld* v. *Brown*, 366 U. S. 599, 605, 607.

To meet the test spelled out by the Chief Justice in the Court's opinion in *McGowan*, it would be necessary to find that the Regents' prayer is a "secular prayer," a contradiction in terms.

F. Various religious practices not involving public schools are not legal precedents for this case.

In public debates on separation of church and state in the United States, reference is frequently made to various practices carried on under the authority of government, such as chaplains in the Congress, Presidential proclamations of a day of Thanksgiving, and invocation of God at court openings. These practices are cited to support the proposition that religious practices may be included in the public schools.[10]

In fact, the Court of Appeals' opinion below mentions some of these traditional practices to buttress its conclusion that the First Amendment does not exclude prayer from the schools. In this connection, the Court of Appeals cited the dictum of Mr. Justice Douglas in *Zorach* v. *Clauson*, *supra*, that "We are a religious people whose institutions presuppose a Supreme Being." *Id.* at 313.

The opinion below said this statement "paraphrased the Supreme Court's similar assertion in 1892 in the *Holy Trinity Church* case." This was obviously a reference to

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10. Costanzo, Joseph F., "Religious Heritage of American Democracy", *Thought*, Winter, 1955-56, pp. 485-506; *New York Journal American*, February 25, 1959, Editorial; *Brooklyn Tablet*, August 1, 1959; *Religious News Service*, September 28, 1958; *New York Herald-Tribune*, May 16, 1960, "Letters to the Editor"; *The New York Times*, March 9, 1961, p. 17, March 12, 1961, p. E9, March 13, 1961, p. 25, March 15, 1961 (Catholic Statement on School Loan Bill) p. 26.

the phrase "* * * this is a Christian nation." *Church of the Holy Trinity of the United States* v. *United States*, 143 U. S. 457, 472 (1892). We do not believe that the statement of Mr. Justice Brewer in the *Holy Trinity Church* case, implying as it does a second-class status in the United States for non-Christian religions, was what Mr. Justice Douglas meant in his statement quoted from *Zorach*. As a matter of fact, Mr. Justice Douglas himself in his recent dissenting opinion in *McGowan* v. *Maryland*, *supra*, at 563, expounded on his statement in *Zorach*.

Mr. Justice Douglas noted that the individual possessed rights "conferred by the Creator, which government must respect" and he cited the Puritan influence which helped shape our society and which "put individual conscience and individual judgment in the first place." *McGowan* v. *Maryland*, *supra*, at 562-563. Having said this to explain his statement that "We are a religious people whose institutions presuppose a Supreme Being," Mr. Justice Douglas emphasized his view of the First Amendment as requiring "that if a religious leaven is to be worked into the affairs of our people, it is to be done by individuals and groups, not by the government." *Id.* at 563.

The *amici* herein agree that the state and religion in the United States are not and should not be "hostile, suspicious [or] even unfriendly." *Zorach* v. *Clauson*, *supra*, at 312. This mutual respect between the institutions of church and state accounts for many of the traditional practices cited by this Court in *Zorach* (at 313) and by the Court of Appeals below. But the Regents' prayer, which is here in issue, is something different. It is the introduction into the school program of a religious act—prayer to God—which has been designed, authored and endorsed by a state authority.

It should be noted that none of the traditional practices, cited by Mr. Justice Douglas in *Zorach*, relates to the sensitive area of public school education. Extreme care must be exercised not to extend beyond their original scope practices which still await judicial endorsement. We believe, for example, that the employment of chaplains by the Congress is no authority for the employment of chaplains by the public schools.

Some of the traditional religious practices cited in public discussions of church-state issues spring from colonial days before disestablishment and the adoption of the First Amendment. One of the reasons that they continue to this day is that it is most difficult to secure authoritative adjudication of their constitutional validity. See *Massachusetts v. Mellon*, 262 U. S. 447 (1923).

Conclusion

The Regents' prayer, required as part of the opening exercises in the public schools of New Hyde Park, New York, is an establishment of religion in violation of the First Amendment made applicable to the states by the Fourteenth Amendment. The decision of the Court of Appeals should therefore be reversed.

Respectfully submitted,

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Appendix "A"

NEW YORK STATE BOARD OF REGENTS STATEMENT OF NOVEMBER 30, 1951

Belief in and dependence upon Almighty God was the very cornerstone upon which our founding fathers builded.

Our state constitution opens with these solemn words: "We the people of the State of New York, grateful to Almighty God for our freedom, in order to secure its blessings, do establish this constitution."

We are convinced that this fundamental belief and dependence of the American—always a religious—people is the best security against the dangers of these difficult days.

In our opinion, the securing of the peace and safety of our country and our state against such dangers points to the essentiality of teaching our children, as set forth in the Declaration of Independence, that Almighty God is their creator and that by Him they have been endowed with their inalienable rights of life, liberty and the pursuit of happiness.

We believe that at the commencement of each school day the act of allegiance to the flag might well be joined with this act of reverence to God: "Almighty God, we acknowledge our dependence upon Thee, and we beg Thy blessing upon us, our parents, our teachers and our country."

We believe that the school day thus started might well include specific programs stressing the moral and spiritual heritage which is America's, the trust which our pioneering ancestors placed in Almighty God, their gratitude to Him from whom they freely and frequently acknowledged came their blessings and their freedom and their abiding belief in the free way of life and in the universal brotherhood of man based upon their acknowledgement of the fatherhood of their creator, Almighty God, whom they loved and reverenced in diverse ways.

We believe that thus constantly confronted with the basic truth of their existence and inspired by the example of their ancestors, our children will find all their studies brought into focus and accord, respect for lawful authority and obedience to the law will be the natural concomitant of their growth, and each of them will be properly prepared to follow the faith of his or her father, as he or she receives the same at mother's knee or father's side and as such faith is expounded and strengthened for them by his or her religious leaders.

We believe that thus the school will fulfill its high function of supplementing the training of the home, ever intensifying in the child that love for God, for parents and for home, which is the mark of true character training and the sure guaranty of a country's welfare.

We believe that such is the best way of insuring that this government and our way of life shall not perish from the earth.

We believe that this statement will be subscribed to by all men and women of good will, and we call upon all of them to aid in giving life to our program.

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Supreme Court of the United States

OCTOBER TERM, 1961

No. 468

IN THE MATTER OF THE APPLICATION

of

STEVEN I. ENGEL, DANIEL LICHTENSTEIN, MONROE LERNER, LENORE LYONS and LAWRENCE ROTH,

Petitioners,

against

WILLIAM J. VITALE, JR., PHILIP J. FREED, MARY HARTE, ANNE BIRCH and RICHARD SAUNDERS, constituting the Board of Education of Union Free School District Number Nine, New Hyde Park, New York,

Respondents,

directing them to discontinue a certain school practice

and

HENRY HOLLENBERG, ROSE LEVINE, MARTIN ABRAMS, HELEN SWANSON, WALTER F. GIBB, JANE EHLEN, RALPH B. WEBB, VIRGINIA ZIMMERMAN, VIRGINIA DAVIS, VIOLET S. COX, EVELYN KOSTER, IRENE O'ROURKE, ROSEMARIE PETELENZ, DANIEL J. REEHIL, THOMAS DELANEY and EDWARD L. MACFARLANE,

Intervenors-Respondents.

BRIEF OF RESPONDENTS

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Intervenors-Respondents.

BRIEF OF RESPONDENTS

Opinions Below

The opinion of the Special Term of the Supreme Court of the State of New York, Nassau County (R. 50-116), is reported at 18 Misc. 2d 659, 191 N. Y. S. 2d 453. The

majority and concurring opinions of the Appellate Division of the Supreme Court of the State of New York, Second Department (R. 123-40), are reported at 11 App. Div. 2d 340, 206 N. Y. S. 2d 183. The majority, concurring and dissenting opinions of the Court of Appeals of the State of New York (R. 142-55) are reported at 10 N. Y. 2d 174, 184 N. Y. S. 2d 659, 176 N. E. 2d 579.

Constitutional and Statutory Provisions Involved

While petitioners in their brief (pp. 2-3) have set forth the First and Fourteenth Amendments to the Federal Constitution, as well as the resolution of the respondent Board of Education of July 8, 1958 (R. 40), pursuant to which the saying of the Regents' Prayer was instituted as a daily procedure in the schools of the District, there should also be included at this point the regulation adopted by respondents on September 3, 1959, which read (R. 171-2):

> "1. Neither teachers nor any school authority shall comment on participation or non-participation in the exercise nor suggest or request that any posture or language be used or dress be worn or be not used or not worn.
>
> 2. Provision is to be made for those children who are to be excused from participating or from the room during the prayer exercise.
>
> 3. Any child may be excused on written request of the parent or legal guardian and all parents will be so advised that the request should be so made, addressed to the principal of the school which the child attends."

Each parent and taxpayer received a letter (R. 172-3) which advised that opening exercises at school included

the Regents' Prayer, set forth at length, after which, the letter read:

> "Any parent or guardian who does not wish his child to say the prayer is requested to write a letter to the principal of the school his child attends, indicating whether he wants his child excused from the room or to remain silent in the room while the prayer is being said."

Question Presented

Do the First and Fourteenth Amendments compel the total abolition of a brief non-denominational prayer composed by the Board of Regents of the University of the State of New York in language taken from the preambles of various State Constitutions, in accordance with an historic tradition of public prayer and recommended by the Regents for voluntary recital by public school pupils in conjunction with the pledge of allegiance to the flag in an attempt to provide in the public schools of New York a simple recognition of this country's moral and spiritual heritage, where there is no showing of any compulsion upon any pupil to participate, and when any pupil whose parents object is excused from participation?

Statement of the Case

A. The Background of the Litigation.

The petitioners in a special proceeding under Article 78 of the New York Civil Practice Act (R. 9-18) sought an order directing the respondents, the Board of Education of Union Free School District Number Nine, New Hyde Park, New York (hereinafter sometimes referred to as the "Board"), to require them to discontinue or cause to be discontinued in the schools of said school district the saying of the prayer (sometimes referred to herein as the

"Regents' Prayer") daily in said schools following the Salute to the Flag pursuant to a resolution passed by respondents (R. 40).

The New York Supreme Court, Special Term (Meyer, J.), in a lengthy and careful opinion (R. 50-116; 18 Misc. 2d 659), held that the Regents' Prayer did not violate either the Federal or the State Constitutions. It ruled that the "establishment" clause of the First Amendment did not prohibit the non-compulsory saying in the public schools of that Prayer but that the "free exercise" provision of the First Amendment required that parents be advised of the adoption of the School Board's resolution so requiring, of the wording of the Prayer and of the procedure to be followed in its recital, so that a conscious choice could be made whether a child should or should not participate.

In arriving at these conclusions, the Court below reasoned:

> The question involved is one of constitutional power, not of policy.
>
> There is in our constitutional history, however, and in the history of public education a long tradition of prayer.
>
> Nothing in the history of the First or Fourteenth Amendments or in the personal views of Franklin, Madison or Jefferson suggests any intention to exclude non-compulsory prayer from the schools.
>
> Freedom of religion includes the right publicly to express religious beliefs.
>
> The "establishment" clause prohibits direct compulsion on individuals in matters of religion, but prohibits indirect compulsion (through tax payments, for example) only when the state and religion are too closely connected. "The democratic nature of our government precludes the imposition of sanctions in the field of religion; the religious nature of the governed sanctions

the inclusion of religion in the processes of democratic life; the dividing line between permitted accommodation and proscribed compulsion is a matter of degree, to be determined anew in each new fact situation." (R. 96)

The religion clauses protect non-believers as well as believers; every individual has a constitutional right personally to be free from religion, but he may not compel others to adopt the same attitude.

The Regents' Prayer is not religious instruction. Recital of it is not within prohibited degree as an indirect compulsion.

Religious tensions and division over the saying of the prayer is not a constitutional reason for not permitting it to be said. "The genius of the American experiment has been not a lack of difference in point of view, but absolute equality in matters of thought and belief despite all differences." (R. 112)

The Regents' Prayer is not sectarian merely because it does not fully accord with the tenets of all of petitioners' or any group's beliefs. So long as "each is free to follow his own predilection with respect to prayer, to participate in a prayer exercise or to refuse to do so, the exercise cannot be deemed preferential." (R. 113)

The order entered upon this determination in Supreme Court, Nassau County (to the extent relevant to appellate proceedings) denied the petition (and accordingly refused to order the discontinuance of the Regents' Prayer), denied petitioners' demand for a jury trial, and directed that the matter be remanded to the respondent Board of Education for proceedings not inconsistent with the Court's opinion (R. 6-8). That opinion in substance directed the Board to adopt certain specific safeguards, confirming its existing practice, to ensure that the recital of the Regents' Prayer was a voluntary matter, to be observed or not at the election of the child or his parents (R. 8, 105-09).

On appeal to the Appellate Division, Second Department, this order was affirmed *per curiam*, one Justice concurring in part and dissenting in part (R. 124-25; 11 App. Div. 2d 340). A final order was then entered in Supreme Court, Nassau County, dismissing the proceeding on the merits on the ground that respondent School Board, by taking the steps recited at page 2 above, had complied with the directions of Special Term, as affirmed (R. 148-49).

The Court of Appeals, by a 5 to 2 vote, affirmed the decisions below (10 N. Y. 2d 174). That Court first held that there were:

> "• • • adequate provisions to ensure that no pupil need take part in or be present during the act of reverence so any question of 'compulsion' or 'free exercise' is out of the case (see Zorach v. Clauson, 343 U. S. 306)."

The Court went on to hold that the vountary recital of the Prayer was not an "establishment of religion," saying:

> "The 'Regents prayer' is an acknowledgment of our dependence upon Almighty God and a petition for the bestowal of His blessings. It includes an acknowledgment of the existence of a Supreme Being just as does the Declaration of Independence and the Constitutions of each of the 50 States of the Union, including our own. In construing even a Constitution some attention must be paid to the obvious intent of those who drafted it and adopted it (*Matter of Carey* v. *Morton*, 297 N. Y. 361). That the First Amendment was ever intended to forbid as an 'establishment of religion' a simple declaration of belief in God is so contrary to history as to be impossible of acceptance.

Judge Froessel, in his concurring opinion, said:

> "The narrow question presented is: Do the Federal and State Constitutions prohibit the recitation by chil

dren in our public schools of the 22 words acknowledging dependence upon Almighty God, and invoking His blessing upon them, their parents and teachers, and upon our country? To say that they do seems to me to stretch the so-called separation of church and State doctrine beyond reason.

* * * * * *

One may earnestly believe in God, without being attached to any particular religion or church. Hence a rule permitting public school children, willing to do so, to acknowledge their dependence upon Him, and to invoke His blessings, can hardly be called a 'law respecting an establishment of religion' or 'prohibiting the free exercise thereof'' in transgression of the First Amendment which in nowise prohibits the recognition of God, or laws respecting such recognition.

The challenged recitation follows the pledge of allegiance, which itself refers to God. School children are permitted to sing 'America', the fourth stanza of which is indeed a prayer, invoking the protection of 'God', 'Author of Liberty'. The preamble to our State Constitution, wh. h is taught in our public schools, provides: 'We the People of the State of New York, grateful to Almighty God for our Freedom'. Virtually every State Constitution in the United States, as well as the Declaration of Independence, contains similar references. To say that such references, and others of like nature employed in the executive, legislative and judicial branches of our Government (see *Zorach* v. *Clauson*, 343 U. S. 306, at pp. 312-313), unrelated to any particular religion or church, may be sanctioned by public officials everywhere but in the public school room defies understanding.

* * * * *

Here no partiality is shown, nor are classrooms being turned over to religious instructors as in

McCollum v. *Board of Educ.* (333 U. S. 203). Any effort of a particular group to promote its own beliefs, doctrines, tenets and dogma must be carried on outside the public school, and any law to the contrary would violate the First Amendment. (*McCollum* v. *Board of Educ., supra.*)

As we see it, then, the challenged recitation was rightly upheld. It is not compulsory, is clearly nonsectarian in language, and neither directly nor indirectly even suggests belief in any form of organized or established religion. It permits each child to express gratitude to God and to invoke His blessing, to be steadfast in the faith of his acceptance if he has one; it compels no one, directly or indirectly, to do anything, if that be his or his parents' wish. All remain free, and thus we do not show preference as between 'those who believe in no religion' and 'those who do believe' (*Zorach* v. *Clauson, supra,* p. 314)."

B. The Regents' Prayer.

The Regents' Prayer, the voluntary recital of which petitioners now seek to prohibit in all the public schools of the State, say simply this:

> "Almighty God, we acknowledge our dependence upon Thee, and we beg Thy blessings upon us, our parents, our teachers and our Country."

This prayer was adopted by the respondent Board in accordance with the Statement of Belief adopted by the New York State Board of Regents on November 13, 1951 (R. 28-29) and the Supplemental Statement of 1955 setting forth the Regents Recommendation for School Programs on America's Moral and Spiritual Heritage (R. 30-39). Its language was borrowed from provisions appearing in the Constitutions of nearly all of the states of the Union. (*Cf.* Appendix A to this Brief.)

The Prayer was recommended by the Regents as a means of:

> "• • • stressing the moral and spiritual heritage which is America's, the trust which our pioneering ancestors placed in Almighty God, their gratitude to Him from Whom they freely and frequently acknowledged came their blessings and their freedom and their abiding belief in the free way of life and in the universal brotherhood of man based upon their acknowledgment of the fatherhood of their Creator, Almighty God, Whom they loved and reverenced in diverse ways." (Regents' Statement on Moral and Spiritual Training in the Schools) (R. 28-29)

In this Statement the Regents declared:

> "Belief in and dependence upon Almighty God was the very cornerstone upon which our Founding Fathers builded.
>
> Our State Constitution opens with these solemn words: 'We, the People of the State of New York, grateful to Almighty God for our Freedom, in order to secure its blessings, do establish this Constitution.'
>
> We are convinced that this fundamental belief and dependence of the American—always a religious—people is the best security against the dangers of these difficult days. In our opinion, the securing of the peace and safety of our country and our State against such dangers points to the essentiality of teaching our children, as set forth in the Declaration of Independence, that Almighty God is their Creator, and that by Him they have been endowed with their inalienable rights of life, liberty, and the pursuit of happiness" (R. 28).

The same principles were repeated by the Regents four years later in their unanimous "Recommendation

for School Programs on America's Moral and Spiritual Heritage" (R. 30-39).

> " 'All men are created equal' is the basic principle of the Brotherhood of Man, and 'endowed by their Creator with life, liberty and the pursuit of happiness' is the recognition of the Fatherhood of God, and that these most precious rights come from the Creator and not from the kings, princes or other men. The proposition that 'government derives its just powers from the consent of the governed' is a recognition of the dignity, worth and sovereignty of each individual under God and of the concept of the individual as a sovereign citizen who, with his fellow citizens, is master of the state they have created and not its servant.
>
> The American people have always been a religious people, believing in God each in accordance with his own conscience. As our Supreme Court well stated, 'We are a religious people whose institutions presuppose a Supreme Being' " (R. 33-34).
>
> • • • • •
>
> "The same will give to the student an understanding and appreciation of his role as an individual endowed by his Creator with inalienable rights and as a member of a group similarly endowed: of respect for others, particularly parents and teachers, of devotion to freedom and of reverence for Almighty God" (R. 38).

In recommending this program, which is nothing more than a reaffirmation of our long historical traditions, the Regents specifically warned:

> "In putting such recommendations into effect teachers will be mindful always of the fundamental American doctrine of the separation of church and state, and careful at all times to avoid any and all

sectarianism or religious instruction which advocates, teaches or prefers any religious creed. Formal religion is not to be injected into the public school. It is a matter for the church and the home, for the religious leaders and the parents of each child" (R. 32).

There is no evidence in this case that any pupil in the schools operated by respondent School Board has been subjected in the schools to any sectarian or other formal religious teaching. Undisguised, petitioners' attack is against any voluntary public recognition of belief and trust in God in an effort to obliterate from our public schools any recognition—even on a voluntary basis—of the existence of a Divine Being. In their briefs and arguments below and in their Petition to this Court they attack not merely the Regents' Prayer but any form of prayer whatsoever. They deny to every public school the right to suggest to any child that God is our Creator and the Author of our liberties or to encourage any public expression of gratitude to Him for those liberties, regardless of the wishes of the child or his parents and regardless of the historical and constitutional tradition of this nation.

Summary of Argument

1. The establishment clause of the First Amendment does not prohibit a recognition of Almighty God in public prayer, but on the contrary the history and growth of the United States as evidenced in documents from the earliest days of our nation to the present time would indicate such recognition as a part of our national heritage.
2. The establishment clause of the First Amendment was intended to prohibit a State religion but not to prevent the growth of a religious State. Non-compulsory recitation of the Regents' Prayer does not breach the principle of separation of church and State.

3. The saying of a prayer in public assemblies is traditional in this nation and in the State of New York where it has existed for over a century.

4. The authorities support the position that the non-compulsory recitation of the Regents' Prayer causes no pocket book injury; that voluntary expressions of belief in God should not be abolished because they are allegedly in conflict with the beliefs of some; that, as in the case of the Pledge to the Flag, those who object because of an alleged conflict with their belief should be permitted to refrain from participating, as in the case before the Court, but there should not be an abolition of such voluntary recital.

ARGUMENT

POINT I

Recognition of Almighty God in public prayer is an integral part of our national heritage.

Referring to the First Amendment to the Constitution of the United States, the New York Special Term has said that it agrees that:

> "... the 'establishment' clause cannot have been intended to outlaw the practice in schools any more than from the rest of public life; that is, that prayer in the schools is permissible not as a means of teaching 'spiritual values' but because traditionally, and particularly at the time of the adoption of the First and Fourteenth Amendments, this was the accepted practice." (R. 70-71)

Every adult will recall that he came to know, in his earliest days in school through courses variously designated as History or Citizenship Education, or perhaps even earlier at his father's knee through learning about

the Fourth of July celebration, the significance of the Declaration of Independence. That historic document refers to Almighty God in no less than four instances:

(a) "• • • laws of nature and of nature's God entitled them • • •"

(b) "• • • All men are endowed by their Creator with certain inalienable rights • • •."

(c) "• • • the Supreme Judge of the world • • •."

(d) "• • • with a firm reliance on the protection of Divine Providence • • •."

These references were not accidental but on the contrary were in accord with the basic traditions of both those who originally settled our land and those who came later. The feeling was not restricted to those relatively few men who had a part in establishing this country as a nation but also was a recognition observed by those in whose hands was placed the destiny of the various States which made up the Union. In this connection there have been collected in Appendix A hereto extracts from the Preambles or Constitutions of 49 of the 50 States making similar references.

The Congress of the United States which was responsible in the first instance for adopting the First and Fourteenth Amendments has throughout its history opened the sessions of both houses each day with a prayer seeking Divine guidance and acknowledging the existence of Almighty God.

It is, of course, a matter of common knowledge that both the New York State Senate and Assembly commence their legislative sessions with prayer.

Further recognition of the official observance of prayer is contained in Section 24 of the New York State General Construction Law where in defining the term holiday is

included "* * * each day appointed by the president of the United States or by the governor of this state as a day of general thanksgiving, general fasting and prayer, or other religious observances * * *."

Nor was the subject of our national heritage overlooked when our Legislature established the New York State Education Law for, we find the Regents being directed (Sec. 801) to prescribe courses of instruction " in the history, meaning, significance and effect of the provisions of the constitution of the United States, the amendments thereto, the declaration of independence, the constitution of the state of New York and the amendments thereto * * *." Special Term, in a slightly different vein in its opinion below, has traced "the history of the constitutional provisions and of public education" (R. 71-82) on which respondents will rely, without unnecessary repetition in this brief.

POINT II

The Constitution of the United States is incapable of being so interpreted as to require that the wall of separation of church and State become an iron curtain.

"God who gave us life, gave us liberty. Can the liberties of a nation be secure when we have removed the conviction that these liberties are the gift of God?" These are the words of Thomas Jefferson (referred to in Appendix C, hereto) who, it has been recorded, is the author of some of our fundamental historic documents and the famous phrase "wall of separation of church and State."

Zorach v. *Clauson*, 303 N. Y. 161 (1951), 343 U. S. 306, is one of the most recent and most famous cases involving the separation of church and State in either this State or in the history of the United States Supreme Court. There was there involved the released time program which had been authorized by the State Legislature in 1940, re-

sulting in the promulgation of regulations relating thereto by the Commissioner of Education of the State of New York and, in that particular case, additional rules established by the New York City Board of Education.

There, as in the instant case, the choice of whether to join in the program or not was that of the parents and the children and there, too, many if not all of the charges contained in the petitioners' pleading herein were voiced (as a matter of fact the language of the pleading in that case and in this case are almost identical). After the courts of New York had consistently upheld "released time" against constitutional attack, this Court affirmed their rulings, holding that government and religion need not be implacably hostile but could, to a reasonable extent, accommodate each other's legitimate interests.

The intent of the First Amendment has more recently been the subject of a judicial decision in New York State as it appears in the opinion of Mr. Justice Bookstein in *Lewis* v. *Allen*, 5 Misc. 2d 68, 159 N.Y.S. 2d 897, in the following language:

> "If I properly apprehend the intent, design and purposes of the First Amendment, it was conceived to prevent and prohibit the establishment of a *State Religion;* it was not intended to prevent or prohibit the growth and development of a *Religious State.*
>
> This concept finds judicial support in Holy Trinity Church v. United States, 1892, 143 U. S. 457, at page 470, 12 S. Ct. 511, at page 516, 36 L. Ed. 226, where the Court says 'this is a religious nation'.
>
> In 1951, that Court said in Zorach v. Clauson, 343 U. S. 306, at page 313, 72 S. Ct. 679, at page 684, 96 L. Ed. 954, 'We are a religious people whose institutions presuppose a Supreme Being'.
>
> The Declaration of Independence refers to 'the Supreme Judge of the world', and 'the protection of Divine Providence'. Lincoln, at Gettysburg, spoke of

'this nation, under God'. Even the preamble to the New York Constitution expresses gratitude 'to Almighty God for our Freedom'. Indeed, the presidential oath of office concludes, 'So Help Me, God'. By Act of Congress, our coins are inscribed, 'In God we trust'.

If petitioners' contention be sound, it may be wondered whether the public school curriculum might properly include the Declaration of Independence and the Gettysburg address. Could 'America' ('* * * Protect us by thy might, Great God, our King!') be sung in a public school without offending the First Amendment? And might not the presidential oath of office have questionable constitutional status?" (p. 812; Italics by the Court)

Nor were the rhetorical questions left unanswered by the Court for the Justice found support once more in authoritative judicial and legislative interpretation as follows:

"These questions find their answer in House Report No. 1693,* note 2, supra. There the Committee on Judiciary notes:

"The Supreme Court has clearly indicated that the references to the Almighty which run through our laws, our public rituals and our ceremonies in no way flout the provisions of the first amendment (Zorach v. Clauson, 343 N. S. 306, 312-313 '72 S. Ct. 679, 96 L. Ed. 954'). In so construing the first amendment, the Court pointed out that if this recognition of the Almighty was not so, then even a fastidious atheist or agnostic could object to the way in which the Court itself opens each of its sessions, namely, 'God save the United States and the Honorable Court' (Id., [343 U. S.] 313 [72 S. Ct. 683])". (pp. 812-813)

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* This Report is set forth in Appendix B hereto.

The facts in the foregoing case, *Lewis* v. *Allen*, 5 Misc. 2d 68, 159 N.Y.S. 2d 807, show that the proceeding was brought on by petition under Article 78 to compel the Commissioner of Education to perform a duty which allegedly he had failed to perform with respect to a regulation calling for the use of the phrase "Under God" in the Pledge of Allegiance to the Flag of America. Petitioners there contended that, as in the instant case, there was some nebulous "non-discretionary duty" on the part of the Commissioner of Education to rescind his regulations regarding the new Pledge, as it had been enacted by Congress in 1954. There, too, as here, the petitioners claimed there was some *compulsory* aspect about even a voluntary reference to God by others, and that such compulsion violates the same portions of the Federal and State Constitutions as petitioners have referred to in the instant case. The Court there noted (as we would respectfully urge the Court here to note) that there was "no compulsory aspect. No penalties attached to a failure or refusal to recite the Pledge. The Pledge is made voluntarily and no penalties are imposed for non-compliance" (p. 811).

POINT III

Judicial, legislative, administrative and text writers have agreed that what the framers of the First Amendment had in mind did not project the idea of wall of separation of church and State into a "governmental hostility to religion" which would be "at war with our national tradition."

For a century and a half, the First Amendment has been a guide to the religious freedom of this country and, while it has existed, public recognition of God, of religion and of prayer has continued and flourished. Throughout the field of text writing, judicial pronouncements, legislative enactments and administrative implementation for all of this period we find a pattern which recognizes the intent and

meaning of the framers of the First Amendment which is confirmatory of their own public pronouncements.

As stated by Judge Desmond in his concurring opinion in *Zorach* v. *Clauson*, 303 N. Y. 161, 175, if the idea that any governmental recognition of God's existence is unconstitutional,

> "then every President has offended by invoking the Deity in his oath of office, by issuing Thanksgiving proclamations and calling on our people to pray for victory in war, or for peace, or for our soldiers' safety. If petitioners are right, then there is a violation every time a chaplain opens a Congressional session with prayer, or an army bugler sounds 'Church call'. If petitioners are right, then the Pilgrims were wrong as was every President who officially urged our people to train themselves in, and practice, religion. Our own State Constitution, on petitioners' theory offends against American Constitutionalism at the point in its preamble where it expresses gratitude 'to Almighty God' for our freedom. Petitioners would have this court now deny the declarations of the Supreme Court in the *Church of Holy Trinity* v. *United States* case, 143 U. S. 457, 12 S. Ct. 511, 36 L. Ed. 226 and of Chief Justice Kent in the *People* v. *Ruggles* case, 8 Johns. 290, in 1811, that ours is a religious nation. I stand on Chief Justice Kent's declaration, long ago in the *Ruggles* case, 8 Johns. at page 296, that the Constitution 'never meant to withdraw religion in general, and with it the best sanctions of moral and social obligation, from all consideration and notice of the law'."

Nor did Judge Froessel, also writing in *Zorach* v. *Clauson*, 303 N. Y. 169, at page 170, overlook the thought that the constitutional provisions regarding the relationship of religion and the State were two-fold, in that while on the one hand they prohibited the establishment of a State

church, on the other hand they also prohibited any law interfering with the "free exercise" of religious profession. Thus, in quoting from a previous Court of Appeals case (*Lewis* v. *Graves*, 245 N. Y. 198), he calls attention to the language:

> "Neither the Constitution nor the law discriminate against religion. Denominational religion is merely put in its proper place outside of public aid or support."

Again, in his opinion Judge Froessel points to the fallacy of eliminating every "friendly gesture" between church and State on the theory of "separation" when he says (at p. 172):

> "It is thus clear beyond cavil that the Constitution does not demand that every friendly gesture between church and State shall be discountenanced. The so-called 'wall of separation' may be built so high and so broad as to impair both State and church, as we have come to know them. Indeed, we should convert this 'wall', which in our 'religious nation', *Church of Holy Trinity* v. *United States*, 143 U. S. 457, 470, 12 S. Ct. 511, 36 L. Ed. 226, is designed as a reasonable line of demarcation between friends, into an 'iron curtain' as between foes, were we to strike down this sincere and most scrupulous effort of our State legislators, the elected representatives of the People, to find an accommodation between constitutional prohibitions and the right of parental control over children. In so doing we should manifest 'a governmental hostility to religion' which would be 'at war with our national tradition', *People of State of Illinois ex rel. McCollum* v. *Board of Education of School Dist. No. 71 supra*, 333 U. S. at page 211, 68 S. Ct. at page 465, and would disregard the basic tenet of constitutional law that 'the public interests imperatively demand—that legis-

> lative enactments should be recognized and enforced by the courts as embodying the will of the people, unless they are plainly and palpably, beyond all question, in violation of the fundamental law of the Constitution', *Atkin* v. *State of Kansas*, 191 U. S. 207, 223, 24 S. Ct. 124, 128, 48 L. Ed. 148.
>
> "While extreme care must, of course, be exercised to protect the constitutional rights of these appellants, it must also be remembered that the First Amendment not only forbids laws 'respecting an establishment of religion' but also laws 'prohibiting the free exercise thereof'. We must not destroy one in an effort to preserve the other."

Further in establishing the intent of Congress, Cooley's Principles of Constitutional Law, 224-225, 3rd ed. (1898) read as follows:

> "By establishment of religion is meant the setting up or recognition of a state church, or at least the conferring upon one church of special favors and advantages which are denied to others (citing 1 Tuck, Bl. Com. App. 296; 2 id., App., Note G). It was never intended by the Constitution that the government should be prohibited from recognizing religion, • • • where it might be done without drawing any invidious distinctions between different religious beliefs, organizations, or sects."

The emphasis, indeed, reemphasis of America's moral and spiritual heritage, as promulgated by the New York State Board of Regents, the Commissioner of Education and the respondent School Board through the daily voluntary use of the Regents' prayer draws no "invidious distinctions between different religious beliefs, organizations, or sects" as referred to in the preceding quotation.

As said by Mr. Justice Douglas, speaking for the majority of this Court in *Zorach* v. *Clauson*, 343 U. S. 306 (1952):

> "The First Amendment, however, does not say that in every and all respects there shall be a separation of church and State * * * otherwise, the State and religion would be aliens to each other—hostile, suspicious and even unfriendly * * *. A fastidious atheist or agnostic could even object to the supplication with which the Court opens each session: 'God save the United States and this Honorable Court.' * * *. We are a religious people whose institutions presuppose a Supreme Being. We guarantee the freedom to worship as one chooses. We make room for as wide a variety of beliefs and creeds as the spiritual needs of man deem necessary. We sponsor an attitude on the part of government that shows no partiality to any one group and that lets each flourish according to the zeal of its adherents and the appeal of its dogma. When the state encourages religious instruction or cooperates with religious authorities by adjusting the schedule of public events to sectarian needs, it follows the best of our traditions. For it then respects the religious nature of our people and accommodates the public service to their spiritual needs. To hold that it may not would be to find in the Constitution a requirement that the government show a callous indifference to religious groups. That would be preferring those who believe in no religion over those who do believe. Government may not finance religious groups nor undertake religious instruction nor blend secular and sectarian education nor use secular institutions to force one or some religion on any person. But we find no constitutional requirement which makes it necessary for government to be hostile to religion and to throw its weight against efforts to widen the effective

> scope of religious influence. The government must be neutral when it comes to competition between sects. It may not thrust any sect on any person. It may not make a religious observance compulsory. It may not coerce anyone to attend church, to observe a religious holiday, or to take religious instruction. But it can close its doors or suspend its operations as to those who want to repair to their religious sanctuary for worship or instruction. No more than that is undertaken here."

As the facts indicate, there is no compulsory aspect attached to the saying of the Regents' prayer in the School District in question, nor is there any effort to foster sectarian religion in the schools any more so than when, as Mr. Justice Douglas pointed out above, the Court itself commences its day with a prayer.

One might wonder if the Supreme Court prayer were slightly reworded so as to read "God save the United States and this School District" whether our opponents might then say that this is "an establishment of religion." Could petitioners then say that such a prayer is forcing "some religion on any person" or that this is thrusting "any sect on any person" or that it makes "a religious observance compulsory" or amounts to "religious instruction"?

Does the prayer used by this Court amount to "an establishment of religion"? Is this sectarian? Would this infringe the rights of either the judiciary or the attorneys appearing on behalf of litigants? Rather would it not be in keeping with our American tradition of voluntary public prayer and our moral and spiritual heritage? We submit that it is the latter.

Attention should also be drawn to House Report No. 1693 set forth in toto in Appendix B to Respondents' brief, where Representative Rabaut who introduced the resolu-

tion which led to the insertion of the words "under God" in the Pledge of Allegiance, stated:

> "Children and Americans of all ages must know that this is one Nation which 'under God' means liberty and justice for all"

and again he said:

> "By the addition of the phrase 'under God' to the pledge, the consciousness of the American people will be more alerted to the true meaning of our country and its form of government. In this full awareness we will, I believe, be strengthened for the conflict now facing us and more determined to preserve our precious heritage.
>
> "More importantly, the children of our land, in the daily recitation of the pledge in school, will be daily impressed with a true understanding of our way of life and its origins. As they grow and advance in this understanding, they will assume the responsibilities of self-government equipped to carry on the traditions that have been given to us. Fortify our youth in their allegiance to the flag by their dedication to 'one Nation, under God'."

The report itself did not overlook the First Amendment and the establishment clause for, after tracing many of the public pronouncements in which God had been clearly recognized, the report says:

> "It should be pointed out that the adoption of this legislation in no way runs contrary to the provisions of the first amendment to the Constitution. This is not an act establishing a religion or one interfering with the 'free exercise' of religion. A distinction must be made between the existence of a religion as an institution and a belief in the sovereignty of God."

Finally, we come to the well known rule of law that administrative interpretation of a statute is to be given great weight in determining its intent, meaning and purpose. While by no means contending that such an interpretation is infallible, a long continued practical and contemporaneous construction is entitled to great significance. See *Dole* v. *City of New York*, 44 N.Y.S. 2d 250 (1943), where the Court said:

> "Considerable force must be attached to the practical construction of the statute by 'public officers whose duty is to enforce it, acquiesced in by all for a long period of time'." (Citing cases) (pp. 252-253)

At the very outset of the Special Term's opinion below, the learned Justice refers to and quotes a policy statement adopted by the Superintendent of the New York public schools in 1837 (154-159). It is apparent from a reading thereof that over 120 years ago the trustees of a school system were given the approval of the Superintendent "to commence the business of the day by public prayer" (R. 53). The opinion of the Superintendent not only has been on record for many years but (as the Special Term pointed out) the ruling originally promulgated in 1837 was repeatedly reaffirmed by successive superintendents right down to 1909. We, therefore, have difficulty in reconciling a statement heretofore made by petitioners that respondents "seek to end the constitutionally-sanctioned and time honored trend of separation of church and state, by the introduction of a new-fangled Prayer into the schools of a District in which prayers were not heretofore said."

The Regents of the State of New York, by way of administrative interpretation, in 1951 first promulgated the prayer which is the subject of this litigation and recommended it for use in the school districts under their jurisdiction, suggesting that "at the commencement of each school day the act of allegiance to the Flag might well be joined with this act of reverence to God" (R. 53-54)

and pursuant to such recommendations, it has become a matter of public knowledge many of the school districts here on Long Island have adopted the recommended procedure of having the prayer said daily in the class rooms as part of the opening exercises (See Exhibit "A" of Affidavit of William J. Vitale, Jr. attached to respondents' answer for 1951 promulgation by Regents (R. 28-29)). In 1955 the Board of Regents saw fit to supplement the 1951 statement (Id. Exhibit "B" (R. 30-39)).

POINT IV

A few seconds of voluntary prayer in the schools, acknowledging dependence on Almighty God, is consistent with our heritage of "securing" the blessings of freedom which are recognized in both the Federal and State Constitutions as having emanated from Almighty God.

Focus upon the petitioners' claim in paragraph 10 of the petition (R. 14) at this point is deemed necessary in view of the dependence of succeeding paragraphs of the petition on such paragraph, as well as the arguments in their brief which rely on this claim. There, where the pleader purports to state carefully how the prayer is led and said, there is studiously avoided any assertion that "the manner" of saying the prayer is pursuant to the *direction* or lack of direction that the teachers in the Herricks School District may be responsible for. Petitioners must be aware that no child is *required* to join in the prayer and that it is conceivable through the training of any particular child that he or she *may* hold their hands in a particular manner and that likewise there may be hundreds of children who hold their hands entirely differently or who do not in any way take a physical posture which reflects a prayerful attitude.

Similar comment can be made regarding the assertion that during the saying of the prayer no student is per-

mitted to leave the class room. This is simply not true. On request any student may be excused in accordance with established procedure.

The petitioners, however, again and again (R. 15-17) refer to the "saying of the prayer and the manner in which it is said", seeking to pull themselves up by their own bootstraps, as it were, having first made a faulty statement of facts and then relying continuously on such faulty statement. For this reason and since these identical charges have been raised again and again and again through the cases involving comparable questions, respondents feel it incumbent to take the petition, paragraph by paragraph starting at paragraph 11 (R. 15) and set forth what the authorities have had to say on each of these subjects.

(a) The use of the public school system and the time and efforts of the teachers and staff of the schools.

Paragraph 11 (R. 15) of the petition contains merely an assertion, unsupported, that the saying of the prayer entails the use of the school system and the time and efforts of teachers and staff. The petition fails to allege anything regarding a separate tax having been levied for this purpose, any specific public monies being used for this purpose, or any damage of any kind to the petitioners. Nor is any invasion of any right of petitioners alleged.

Anticipating petitioners' claim that the ideas expressed in the foregoing paragraph are to be *inferred* from paragraph 11, it must still be concluded, based upon the judicial decisions in which this problem has been before the Court, that they have not suffered any "pocket book injury" as it is sometimes called.

This was the conclusion in *Doremus* v. *Board of Education*, 5 N. J. 435, 75 A. 2d 880 (1950), app. dis. 342 U. S. 429 (1952), where the Supreme Court of the State of New Jersey had upheld the constitutionality of a New Jersey

Statute which provided for the reading, without comment, of five verses of the Old Testament at the opening of each public school day. In this Court, Mr. Justice Jackson, writing for the majority, said:

> "Appellants, apparently seeking to bring themselves within Illinois ex rel. McCollum v. Board of Education, 333 U. S. 203, 92 L. ed. 648, 68 S. Ct. 461, 2 A.L.R. 2d 1338, assert a challenge to the Act in two capacities—one as parent of a child subject to it, and both as taxpayers burdened because of its requirements. • • •
>
> "Klein is set out as a citizen and taxpayer of the Borough of Hawthorne in the State of New Jersey, and it is alleged that Hawthorne has a high school supported by public funds. In this school the Bible is read, according to statute. There is no allegation that this activity is supported by any separate tax or paid for from any particular appropriation or that it adds any sum whatever to the cost of conducting the school. No information is given as to what kind of taxes are paid by appellants and there is no averment that the Bible reading increases any tax they do pay or that as taxpayers they are, will, or possibly can be out of pocket because of it. • • •
>
> "Without disparaging the availability of the remedy by taxpayer's action to restrain unconstitutional acts which result in direct pecuniary injury, we reiterate what the Court said of a federal statute as equally true when a state Act is assailed: 'The party who invokes the power must be able to show not only that the statute is valid but that he has sustained or is immediately in danger of sustaining some direct injury as a result of its enforcement, and not merely that he suffers in some indefinite way in common with people generally.' Massachusetts v. Mellon, supra (262 U. S. at 488, 67 L. Ed. 1085, 43 S. Ct. 597)."

New York State's highest Court has long reiterated this necessity of damage. The Court of Appeals held in *Adler* v. *Metropolitan Elevated Ry. Co.*, 138 N. Y. 173, 180:

> "• • • nor will the Court exert its equitable power of injunction in a case of a violation of a mere abstract right, unaccompanied with any substantial injury."

Mr. Justice Sutherland, speaking for this Court on the sufficiency of a plaintiff's interest in a constitutional issue raised by him, said:

> "That question may be considered only when the justification for some direct injury suffered or threatened, presenting a justiciable issue, is made to rest upon such an act. • • • The party who invokes the power (of judicial review) must be able to show not only that the statute is invalid but that he has sustained or is immediately in danger of sustaining some direct injury as the result of its enforcement, and not merely that he suffers in some indefinite way in common with people generally." *Frothingham* v. *Mellon*, 262 U. S. 447, 488.

(b) The saying of the Regents' prayer as the teaching of religion and religious practices, contrary to the beliefs of the petitioners "who are believers" and their children and contrary to the beliefs of the petitioner and his children "who are non-believers" and therefore, allegedly offensive to such petitioners and their children.

This topical heading is the substance of the allegations in paragraphs 12 and 13 (R. 15) of the petition.

"The term 'religion' has reference to one's views of his relations to His Creator and to the obligations they impose of reverence for His being and character and of obedience to His will. It is often confounded with the cultus or form of worship of a particular sect, but is distinguishable from

the latter." Thus said the New York Appellate Division, Third Department in *Drozda* v. *Bassos*, 260 App. Div. 408, 23 N.Y.S. 2d 544 (1940), quoting with approval from *Davis* v. *Beason*, 133 U. S. 333.

In Appendix C to this brief, there have been set forth the innumerable instances in which reference to Almighty God has been made in our currency, in public pronouncements, in Statutes,—indeed in almost every mode of activity of our Government. Surely, petitioners cannot seriously argue that each such instance represents a "religion" or a "religious practice" and that they find these things offensive to themselves and to their children.

As a matter of fact the petitioners must find themselves in a strangely anomalous position for on the one hand they purport to object to these references as constituting "religion" and "religious practices" and yet they rely on these very documents to support their position in this petition. Their position must be likened to that of the petitioner Joseph Lewis, who in an action against the Board of Education of the City of New York in 1953 (157 Misc. 520, 285 N. Y. Supp. 164) sought among other things to forbid the "use" of school buildings for the reading of the Bible in the public school assemblies. Of the many arguments advanced by the plaintiff there, comparable to those advanced here, the Court said:

> "Undisguised, the plaintiffs attack is on a belief and trust in God and in any system or policy or teaching which enhances or fosters or countenances or even recognizes that belief and trust. Such belief and trust, however, regardless of one's own belief, has received recognition in state and judicial documents from the earliest days of our republic." (p. 167)

The Court there focused the question as being one of "power" not policy, pointing out that the policy had already been decided and the question of power was an issue

in the sense that the determination sought was whether a constitutional guarantee or any other provision or concept of law had been violated. The statement of the Court is as follows:

> "Let it be emphasized that the concern here is with power not policy. Within the boundaries of law what shall and shall not be done in the public schools is an educational function to be determined by those intrusted with the conduct and administration of the public schools. Lewis v. Board of Education of the City of New York, 258 N. Y. 117, 122, 179 N. E. 315, 317." (p. 167)

After quoting the Declaration of Independence, the motto "In God We Trust" and the opening lines of our State Constitution, the opinion continues:

> "Nor have the courts ignored the existence of this declared policy. In People ex rel. Lewis v. Graves, 219 App. Div. 233, 238, 219 N.Y.S. 189, 195, it was said: 'A belief in religion is not foreign to our system of government.'
>
> Our highest court, in Holy Trinity Church v. United States, 143 U. S. 457, 465, 12 S. Ct. 511, 514, 36 L. Ed. 226, said: 'This is a religious people. This is historically true. From the discovery of this continent to the present hour, there is a single voice making this affirmation.'
>
> These quotations are not intended to convey the thought that state and church should be brought into closer harmony. Their separation is a fundamental of immutable virility. Nor do the excerpts indicate the approval or proposal of a policy that religion be taught in the public schools. The principle that religion has no place in public temporal education is so inexorable that a reaffirmation of it would be supererogatory.

These concepts are not repugnant to the constitutional guaranty which safeguards freedom of conscience and of worship and the free entertainment and pursuit of religious beliefs. They are not hostile to section 3 of article 1 of the State Constitution, which declares that: 'The free exercise and enjoyment of religious profession and worship, without discrimination or preference, shall forever be allowed in this State to all mankind'." (p. 168)

• • • • •

"The sanctified principle of freedom of religious belief does not distinguish between believers and nonbelievers. It embraces both, and accords one as much protection and freedom as the other. A sect or tenet which is intolerant of those of a different sect or tenet is the precise antithesis of religious liberty. Freedom is negated if it does not comprehend freedom for those who believe as well as those who disbelieve. The law is astute and zealous in seeing to it that all religious beliefs or disbeliefs be given unfettered expression. Authentic free thinking involves the indubitable right to believe in God, as well as the unfettered license not to believe or to disbelieve in a Deity.

To examine into the sectarianism of those seeking access to public school buildings would make a travesty of our glorified liberty of conscience. Liberty for nonbelievers in God, but denial to believers in a Deity, would be a mock liberty." (pp. 169-170)

Although frequently referred to in petitioners' brief, the decision of this Court in *McGowan* v. *Maryland*, 366 U. S. 420, reviewing Sunday Closing statutes adds little support to petitioners' position. In upholding such laws, it was apparent that the Court recognized the public purpose involved and that any incidental benefit to religion did not warrant removing from the body of our laws those which recognized an integral part of our national heritage and tradition.

(c) The saying of the prayer as allegedly resulting in the exercise of coercion.

The admitted fact is that the prayer is said daily in the public schools of Union Free School District Number 9. Likewise the admitted fact must be that "we are essentially a religious people" and likewise the admitted fact must be that no child can grow up in this country of ours without hearing a constant reference to Almighty God, this being the very nature of our heritage and institutions.

The rule of the respondent Board of Education is that no child is to be required or encouraged to join in the saying of the Regents' Prayer (and if it were otherwise it is a certainty that petitioners would have emphatically so alleged in their petition). There is thus a clear distinction between the instant situation and *West Virginia Board of Education* v. *Barnette*, 319 U. S. 625 (1943), where this Court held unconstitutional the regulation of West Virginia State Board of Education requiring children in the public schools to salute the American flag and pledge allegiance to it under penalty of expulsion. The injunction was issued there, not because those whose religious beliefs were infringed upon were required to *listen* to the salute but because they were required to *join* in the Salute to the flag. It is noteworthy, however, that in recognizing the rights of those whose religion (Jehovah's Witnesses) assertedly prevented them from participating in the Salute and Pledge, the Court did not *abolish* the practice for all others. The observation of Mr. Justice Murphy in his concurring opinion in that case is worthy of note:

> "But there is before us the right of freedom to believe, freedom to worship one's Maker according to the dictates of one's conscience, a right which the Constitution specifically shelters. Reflection has convinced me that as a Judge I have no loftier duty or responsibility than to uphold that spiritual freedom to its farthest reaches." (p. 645)

Mr. Justice Douglas, speaking for the Court in *Zorach* v. *Clauson*, 343 U. S. 306, upholding the New York City release time program again indicated the unwillingness of that Court to strike from our public practices and procedures any reference to God, although it is evident from his language that he was aware that there were those who believed in no religion and who might therefore in some way claim that they were "offended." The Court's statement on the point is as follows:

> "There is much talk of the separation of Church and State in the history of the Bill of Rights and in the decisions clustering around the First Amendment. See Everson v. Board of Education, 330 U. S. 1; McCollum v. Board of Education, supra. There cannot be the slightest doubt that the First Amendment reflects the philosophy that Church and State should be separated. And so far as interference with the 'free exercise' of religion as an 'establishment' of religion are concerned, the separation must be complete and unequivocal. The First Amendment within the scope of its coverage permits no exception; the prohibition is absolute. The First Amendment, however, does not say that in every and all respects there shall be a separation of Church and State."
>
> "We would have to press the concept of separation of Church and State to these extremes to condemn the present law on constitutional grounds."

The recent case before this Court of *Torcaso* v. *Watkins*, 367 U. S. 203, is readily distinguishable from the principles laid down in *Zorach*. There, as a condition to becoming a notary public, deemed to be a public office, the applicant was required to profess a belief in God. This was concluded to be a "religious test oath" violative of our Constitution since it *obligated* a person "to profess a belief or disbelief" in religion (363 U. S. at p. 987). Certainly, there can be no parallel between such compulsion and the

voluntary Regents' Prayer in accordance with our fundamental national tradition.

(d) The saying of the prayer as a sectarian or denominational practice allegedly favoring one or more religions or religious practices over others and favoring religion over non-belief.

We have already seen above that the saying of a prayer as such cannot constitute religion, *per se*. Paragraphs 15 and 16 (R. 16) of the petition, summarized as in the topical heading above, can only be thought to mean, therefore, that there is some "practice" which is sectarian and denominational and favors belief in religion over non-belief. Somehow petitioners overlooked completely the inconsistency of their position in asserting their right not to believe, which no one disputes, and at the same time asserting their right to impose on all others who do believe in a Supreme Being and Almighty God, their claimed right to eliminate reference thereto.

This apparently was the claim of the plaintiffs in *Doremus* v. *Board of Education*, 5 N. J. 435, 75 A. 2d 880 (1950), app. dis. 342 U. S. 429 (1952), in New Jersey which, when it was before the Supreme Court of that State, was answered by the Court's reference to *Cooley* (Constitutional Limitations, Eighth Edition, Volume 2, p. 974) where the author says:

> "While thus careful to establish, protect, and defend religious freedom and equality, the American constitutions contain no provision which prohibit the authorities from such solemn recognition of a superintending Providence in public transactions and exercises as the general religious sentiment of mankind inspires, and as seems meet and proper infinite and dependent beings. Whatever may be the shades of religious belief, all must acknowledge the fitness of recognizing in important human affairs the superintending care and control of the Great governor of the

Universe, and of acknowledging with thanksgiving His boundless favors, of bowing in contrition when visited with the penalties of His broken laws."

Reduced to the barest simplicity, what petitioners are seeking to argue in paragraphs 15 and 16 (R. 16) of their petition is that the alleged holding of children's hands in a manner specified in paragraph 10 (R. 14) coupled with the saying of the prayer constitutes a sectarian or denominational practice favoring one or more religions and religious practices over others and favoring religion over non-belief in religion. This then means that they are disregarding, for the moment at least, whether or not the *adoption* of the procedure of saying a prayer is constitutional or not and are now saying, in effect, that even if it were constitutional, the *method* allegedly used makes the law unconstitutional. This, we submit, cannot be so. It would appear to require no citation of authority to establish in the Court's mind that no law or regulation, otherwise constitutional, can be held by a Court to be unconstitutional because of the *manner* in which some participants carry it out, namely, the practice of some children holding their hands in a certain way because of their own beliefs. This has no more foundation than would the argument that a law or regulation otherwise unconstitutional, if followed by a certain practice, could by the fact be made constitutional.

The foregoing is very similar to what the complaining parties in *Zorach* v. *Clauson*, 303 N. Y. 161, aff. 343 U. S. 306, alleged, namely, that some teacher in the New York City school system so interpreted the release time program as to adopt a practice which the petitioners felt was unconstitutional. No more credence was given by either the Court of Appeals or the United States Supreme Court in that case than should be given by this Court in the instant proceeding.

This proposition is nicely summed up by Mr. Justice Bookstein in *Lewis* v. *Allen*, 5 Misc. 2d 68, 159 N.Y.S. 2d

897, the case involving the revised rendition of the Pledge of Allegiance in the State of New York, where he said:

> "To grant this application 'would be preferring those who believe in no religion over those who do believe.' Zorach v. Clauson, supra, 343 U. S. at page 314, 72 S. Ct. at page 684. The First Amendment does not require this.
>
> Petitioners' right to disbelieve is guaranteed by the First Amendment, and neither they nor their children can be compelled to recite the word 'under God' in the pledge of allegiance. But the First Amendment affords them no preference over those who do believe in God and who, pledging their allegiance, choose to express that belief". (159 N.Y.S. 2d 813)

(e) The saying of the prayer as resulting in "divisiveness".

There are at least five school districts within a few miles of the school district represented by the respondent Board of Education which have adopted the identical prayer on the recommendation of the New York State Board of Regents. In each case this procedure has been in effect for several years and in some, five or six years, yet the students at these schools seem to be normal, well adjusted, healthy American children, not at all warped in their thinking as a result of this daily reference to Almighty God. The respondents meet weekly as a Board of Education and since the prayer was instituted there was noted no "divisiveness" among parents or children and certainly none was brought in writing to the Board of Education until petitioners served their demand, heretofore referred to. Any parent may disagree with the "advisability" of some "policy" undertaken by a Board of Education but this disagreement does not warrant a striking down of such policy as being unconstitutional.

We have already seen that in *Zorach* v. *Clauson*, 303 N. Y. 161, aff. 343 U. S. 306, released time has been held

constitutional in the State of New York yet some of the children avail themselves of one hour weekly pursuant to the release time program for religious training and others do not. Our State Courts and the United States Supreme Court, however, did not hold that the "divisiveness" thereby created, if any, would warrant striking down the release time program.

There are many occasions during a school year when children are excused for absence for the purpose of observance of religious holidays. When this occurs some children stay away from school while others attend. On still other holidays some children stay away to attend worship. Is this what petitioners call 'divisive"? Would the petitioners have this Court hold that such holiday observances should be banned because they identify one or more children with one religion or another? Certainly to do so would strike down one of our basic constitutional guarantees, i.e, religious liberty.

Complete secularism to the entire exclusion of religion or even recognition of Almighty God would be the watchword of petitioners. They would rewrite the books in which it has been held that "this is a religious people" or, as stated by the United States Supreme Court before the turn of the century, in *Holy Trinity Church* v. *United States*, 143 U. S. 457 (1892):

> "But beyond all these matters no purpose of action against religion can be imputed to any legislation, state or national, because this is a religious people. This is historically true. From the discovery of this continent to the present hour, there is single voice making this affirmation." (p. 465)

In claiming "divisiveness", again we have reliance by petitioners on the *People of the State of Illinois ex rel. McCollum* v. *Board of Education of School District No. 71, Champaign County, Illinois, et al.*, 333 U. S. 203 (1949),

but we find an apt answer in the opinion of Mr. Justice Jackson when he observed, 333 U. S. at pages 232-233, 68 S. Ct. at page 476:

> "The complaint is that when others join and he does not, it sets him apart as a dissenter, which is humiliating. Even admitting this to be true, it may be doubted whether the Constitution which, of course, protects the right to dissent, can be construed also to protect one from the embarrassment that always attends non-conformity, whether in religion, politics, behavior or dress. Since no legal compulsion is applied to complainant's son himself and no penalty is imposed or threatened from which we may relieve him, we can hardly base jurisdiction on this ground."

(f) The saying of the Regents' Prayer as affected by (1) the prohibition against laws respecting an establishment of religion, or (2) prohibiting the free exercise thereof, or (3) the free exercise and enjoyment of religious profession and worship, without discrimination or preference.

This topical heading summarizes the allegations of paragraphs 18, 19 and 20 (R. 16-17) of the petition which, in toto, sumarize the language of the First Amendment to the United States Constitution and Article 1, Section 3 of the New York State Constitution.

As to the charge, here repeated, that the saying of the prayer constitutes an "establishment" of religion, we are content to rely on the points heretofore made that this is neither a logical nor legal conclusion which can be drawn.

As to there being a prohibition against laws which prohibit the free exercise of religion respondents can readily admit that the Constitution so provides. In the instant case, however, there is no "law" to which the petitioners can point as having "established" a religion.

We have here, not "acts which aid in the establishment of a religion, but acts whose purpose is to prevent the restriction of freedom to worship" (*64th St. Residences* v. *City of New York*, 173 N.Y.S. 2d 700, affd. 4 N. Y. 2d 268 (1958)).

Again as stated by the New York Court of Appeals in *Zorach* v. *Clauson* (303 N. Y. at p. 172):

> "• • • it must • • • be remembered that the First Amendment not only forbids laws 'respecting an establishment of religion' but also laws 'prohibiting the free exercise thereof'. We must not destroy one in an effort to preserve the other."

Again, in that same case, Judge Froessel said that instances abound which prove that not "every friendly gesture between church and State shall be discountenanced" (303 N. Y. at pp. 171-172).

(g) The saying of the Regents' Prayer as being in excess of respondents' statutory authority and in violation of their statutory duties.

In paragraphs 21 through 24 (R. 17) of the petition the petitioners have alleged, respectively, that respondents have exceeded their authority under Section 1709 of the Education Law; that if respondents relied on the Board of Regents' "Statement of Belief" then the Statement of Belief violates State and Federal Constitutions; that respondents' failure to discontinue the procedure regarding the saying of the prayer is illegal and constitutes a dereliction of duty; and that the discontinuance of the prayer is a non-discretionary duty imposed upon residents by the State and Federal Constitutions.

For the convenience of the Court we should first examine Section 1709 of the New York State Education Law. This Section is entitled: "Powers and Duties of Boards of Education" and applies particularly to Union Free School Districts.

By subparagraph 2 of Section 1709 of the Education Law a Board of Educators is given power "and it shall be its duty" to establish rules and regulations "concerning the order and discipline of the school * * * as they may deem necessary to secure the best educational results."

Should there have been anything missing from the above, there is an omnibus subparagraph 33 reading:

> "33. To have in all respects the superintendence, management and control of the educational affairs of the district, and, therefore, shall have all the powers reasonably necessary to exercise powers granted expressly or by implication and to discharge duties imposed expressly or by implication by this chapter or other statutes."

We come now to the the charge contained in paragraph 23 (R. 17) of the petition which asserts that respondents' refusal to discontinue the saying of the prayer upon demand of petitioners "is illegal and constitutes a dereliction of duty"; or, conversely, that the petitioners having made their claim, there is now a "non-discretionary duty" on the part of the respondents imposed by the Federal and State Constitutions (Petition, paragraph 24 (R. (17)).

We must now go back once more to the Declaration of Independence in its assertion of "self-evident truths" that "all men are endowed by their Creator with certain inalienable Rights." This was followed with the assertion that "to *secure* these Rights, Governments are instituted among Men." Resorting once more to the United States Supreme Court for emphasis with respect to the "securing" of these inalienable rights, we find this language in the concurring opinion by Mr. Justice Field in *Butcher's Union, etc., Co.* v. *Crescent City, etc., Co.*, 111 U. S. 746 (at p. 756):

> "As in our intercourse with our fellowmen certain principles of morality are assumed to exist, without

which society would be impossible, so certain inherent rights, lie at the foundation of all action, and upon a recognition of them alone can free institutions be maintained. These inherent rights have never been more happily expressed than in the Declaration of Independence, that new evangel of liberty to the people: 'We hold these truths to be self-evident,' that is, so plain that their truth is recognized upon their mere statement, 'that all men are endowed', not by edicts of Employers or decrees of Parliament or acts of Congress, but 'by their Creator, with certain inalienable rights', that is, rights which cannot be bartered away or given away or taken away except in punishment of crime, 'and that among these are life, liberty and the pursuit of happiness, and to secure these' not grant them but secure them, 'governments are instituted among men, deriving their just powers from the consent of the governed'."

Apparently the "same duty" was referred to and relied upon by the petitioners in the proceeding before Justice Bookstein in *Lewis* v. *Allen*, 5 Misc. 2d 68, 159 N.Y.S. 2d 897, involving the Flag Salute where we find the terse comment:

> "No statutory duty has been shown which requires respondent to rescind or revoke the regulation. So it cannot be said that respondent has failed to perform a duty imposed upon him by Statute."

But there, as here, the petitioners contended that the duty was imposed on the respondents by the First and Fourteenth Amendments to the United States Constitution and by Article 1, Section 3, among others, of the New York State Constitution. After reviewing the Education Law provisions (as well as the Federal Code, applicable in that case) the Court concluded that in making a

regulation regarding the Flag Saiute the "respondent was performing his duties." The Court went on to say:

> "Respondent has made a regulation pursuant to express direction of a Statute of this State and in conformance with a law of the United States. How then can he be charged with failing to perform his duty?" (p. 809)

In that case the Commissioner of Education made a specific regulation regarding the Flag Salute. In the instant case, his superiors, the Board of Regents, made a recommendation which has been urged by him as a proper subject of adoption by school districts such as that in which respondents constitute the Board of Education. Here too it might be asked: "How then can he be charged with failing to perform his duty?"

By analysis to Mr. Justice Bookstein's opinion, the petitioners' contention is reduced to a claim that the respondents should not perform the duties or abide by the recommendations of either the Board of Regents or the State Commissioner of Education since to do so violates the State and Federal Constitutions. On this subject, the opinion reads (5 Misc. 2d 68, 159 N.Y.S. 2d 897):

> "To sustain that contention implies respondent has not only the right, but the duty, to determine the constitutionality of an Act of the State Legislature or of the Congress and to refuse to perform, where in his judgment, such act is unconstitutional.
>
> "Clearly, this is the exclusive domain of the judiciary. It is not a function of administrative officials."

We believe, that Mr. Justice Bookstein had a complete and final answer to allegations of this type and apparently both the New York Court of Appeals and the United States Supreme Court felt similarly in *Zorach* v. *Clauson*,

303 N. Y. 161, 343 U. S. 306, where, the record on appeal in that case shows (p. 22 of that record) that these identical charges were contained in the petition and were apparently considered to be without merit in view of the failure of either Court to agree with petitioners.

Conclusion

The noncompulsory saying of the "Regents' Prayer" does not violate any Statute giving rise to either a clear legal duty on the part of respondents to discontinue such practice, nor has there been any violation by the saying of such prayer, consistent with the basic national traditions of a religious country, as our highest Courts have said we are, which would authorize the issuance of an injunction as sought by petitioners to abolish the Prayer.

The order appealed from should be affirmed.

Respectfully submitted,

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Attorney for Respondents.

Wilford E. Neier,
Of Counsel.

APPENDIX A

The State Constitutions or Preambles thereto of 49 States of the United States acknowledge that the rights and liberties of the people issue from God and express gratefulness therefor.

Alabama (Adopted in 1901)

We, the people of the State of Alabama, in order to establish justice, insure domestic tranquility and secure the blessings of liberty to ourselves and our posterity, invoking the favor and guidance of Almighty God, do ordain and establish the following Constitution and form of government for the State of Alabama.

Alaska (Adopted April 24, 1956)

We the people of Alaska, grateful to God and to those who founded our nation and pioneered this great land, in order to secure and transmit to succeeding generations our heritage of political, civil, and religious liberty within the Union of States, do ordain and establish this Constitution for the State of Alaska.

Arizona (Adopted in 1912)

We, the people of the State of Arizona, grateful to Almighty God for our liberties, do ordain this Constitution.

Arkansas (Adopted in 1874)

We, the people of the State of Arkansas, grateful to Almighty God for the privilege of choosing our own form of government, for our civil and religious liberty, and desiring to perpetuate its blessings and secure the same to ourselves and posterity, do ordain and establish this Constitution.

Appendix A

California (Adopted in 1879)

We, the people of the State of California, grateful to Almighty God for our freedom, in order to secure and perpetuate its blessings, do establish this Constitution.

Colorado (Adopted in 1876)

We, the people of Colorado, with profound reverence for the Supreme Ruler of the Universe, in order to form a more independent and perfect government; establish justice; insure tranquillity; provide for the common defense; promote the general welfare and secure the blessings of liberty to ourselves and our posterity; do ordain and establish this Constitution for the "State of Colorado".

Connecticut (Adopted in 1818)

The people of Connecticut acknowledging with gratitude, the good providence of God, in having permitted them to enjoy a free government, do, in order more effectually to define, secure, and perpetuate the liberties, rights and privileges which they have derived from their ancestors, hereby, after a careful consideration and revision, ordain and establish the following Constitution and form of civil government.

Delaware (Adopted in 1897)

Through Divine goodness, all men have by nature the rights of worshiping and serving their Creator according to the dictates of their consciences, of enjoying and defending life and liberty, of acquiring and protecting reputation and property and in general of obtaining objects suitable to their condition, without injury by one to another; and as these rights are essential to their welfare, for the due exercise thereof, power is inherent in them; and therefore all just authority in the institutions of political society is derived from the people, and established with their con-

sent, to advance their happiness: and they may for this end, as circumstances require, from time to time alter their Constitution of government.

Florida (Adopted in 1887)

We, the people of the State of Florida, grateful to Almighty God for our constitutional liberty, in order to secure its blessings and to form a more perfect government, insuring domestic tranquillity, maintaining public order, and guaranteeing equal civil and political rights to all, do ordain and establish this Constitution.

Georgia (Adopted in 1887)

To perpetuate the principles of free government, insure justice to all, preserve peace, promote the interest and happiness of the citizen, and transmit to posterity the enjoyment of liberty, we, the people of Georgia, relying upon the protection and guidance of Almighty God, do ordain and establish this Constitution.

Hawaii (1959)

We the people of the State of Hawaii, grateful for Divine Guidance, and mindful of our Hawaiian heritage, reaffirm our belief in a government of the people, by the people and for the people, and with an understanding heart toward all the peoples of the earth, do hereby ordain and establish this Constitution for the State of Hawaii.

Idaho (Adopted in 1890)

We, the people of the State of Idaho, grateful to Almighty God, for our freedom, to secure its blessings and promote our common welfare, do establish this Constitution.

Appendix A

Illinois (Adopted in 1870)

We, the people of the State of Illinois grateful to Almighty God for the civil, political and religious liberty which He hath so long permitted us to enjoy, and looking to Him for a blessing upon our endeavors to secure and transmit the same unimpaired to succeeding generations—in order to form a more perfect government, establish justice, insure domestic tranquillity, provide for the common defense, promote the general welfare, and secure the blessing of liberty to ourselves and our posterity, do ordain and establish this Constitution for the State of Illinois.

Indiana (Adopted in 1851)

To the end that justice be established, public order maintained, and liberty perpetuated: We, the people of the State of Indiana, grateful to Almighty God for the free exercise of the right to choose our own form of government, do ordain this Constitution.

Iowa (Adopted in 1857)

We, the people of the State of Iowa, grateful to the Supreme Being for the blessings hitherto enjoyed, and feeling our dependence on Him for a continuation of those blessings, do ordain and establish a free and independent government, by the name of the State of Iowa, the boundaries whereof shall be as follows. . . .

Kansas (Adopted in 1863)

We, the people of Kansas, grateful to Almighty God for our civil and religious privileges, in order to insure the full enjoyment of our rights as American citizens, do ordain and establish this Constitution of the State of Kansas, with the following boundaries. . . .

Appendix A

Kentucky (Adopted in 1891)

We, the people of the Commonwealth of Kentucky, grateful to Almighty God for the civil, political and religious liberties we enjoy, and invoking the continuance of these blessings, do ordain and establish this Constitution.

Louisiana (Adopted in 1921)

We, the people of the State of Louisiana, grateful to Almighty God for the civil, political and religious liberties we enjoy and desiring to secure the continuance of these blessings, do ordain and establish this Constitution.

Maine (Adopted in 1820 and 1876)

We, the people of Maine, in order to establish justice, insure tranquillity, provide for our mutual defense, promote our common welfare, and secure to ourselves and our posterity the blessings of liberty, acknowledging with grateful hearts the goodness of the Sovereign Ruler of the Universe in affording us an opportunity, so favorable to the design; and, impioring His aid and direction in its accomplishment, do agree to form ourselves into a free and independent State, by the style and title of the State of Maine, and do ordain and establish the following Constitution for the government of the same.

Maryland (Adopted in 1867)

We, the people of the State of Maryland, grateful to Almighty God for our civil and religious liberty, and taking into our serious consideration for best means of establishing a good Constitution in this State for the sure foundation and more permanent security thereof, declare. . . .

Massachusetts (Adopted in 1790)

We, therefore, the people of Massachusetts, acknowledging, with grateful hearts, the goodness of the great Legislator of the universe, in affording us, in the course of His

providence, an opportunity, deliberately and peaceably, without fraud, violence, or surprise, of entering into an original, explicit, and solemn compact with each other; and for forming a new Constitution of civil government, for ourselves and posterity; and devoutly imploring His direction in so interesting a design, do agree upon, ordain, and establish the following Declaration of Rights, and Frame of Government, as the Constitution of the Commonwealth of Massachusetts.

Michigan (Adopted in 1909)

We, the people of the State of Michigan, grateful to Almighty God for the blessings of freedom, and earnestly desiring to secure these blessings undiminished to ourselves and our posterity, do ordain and establish the Constitution.

Minnesota (Adopted in 1857)

We, the people of the State of Minnesota, grateful to God for our civil and religious liberty and desiring to perpetuate its blessings and secure the same to ourselves and our posterity, do ordain and establish this Constitution.

Mississippi (Adopted in 1890)

We, the people of Mississippi in convention assembled, grateful to Almighty God, and invoking His Blessing on our work, do ordain and establish this Constitution.

Missouri (Adopted in 1945)

We, the people of Missouri, with profound reverence for the Supreme Ruler of the Universe, and grateful for His goodness, do establish this Constitution for the better government of the State.

Appendix A

Montana (Adopted in 1889)

We, the people of Montana, grateful to Almighty God for the blessings of liberty, in order to secure the advantages of a State government, do in accordance with the provisions of the enabling act of Congress, approve the twenty-second of February A. D. 1889, ordain and establish this Constitution.

Nebraska (Adopted in 1875)

We, the people, grateful to Almighty God for our freedom, do ordain and establish the following declaration of rights and frame of government, as the Constitution of the State of Nebraska.

Nevada (Adopted in 1864)

We, the people of the State of Nevada, grateful to Almighty God for our freedom, in order to secure its blessings, insure domestic tranquillity, and form a more perfect government, do establish this Constitution.

New Hampshire (Adopted in 1784)

Every individual has a natural and unalienable right to worship God according to the dictates of his own conscience, and reason . . . morality and piety, rightly grounded on evangelical principles, will give the best and greatest security to government, and will lay, in the hearts of men, the strongest obligations to due subjection; and the knowledge of these is most likely to be propogated through society by the institution of the public worship of the Deity.

New Jersey (Adopted in 1844)

We, the people of the State of New Jersey, grateful to Almighty God for the civil and religious liberty which He has so long permitted us to enjoy, and looking to Him for

a blessing upon our endeavors to secure and transmit the same unimpaired to succeeding generations, do ordain and establish this Constitution.

New Mexico (Adopted in 1912)

We, the people of New Mexico, grateful to Almighty God for the blessings of liberty, in order to secure the advantages of a State government, do ordain and establish this Constitution.

New York (Adopted in 1895)

We, the people of the State of New York, grateful to Almighty God for our freedom, in order to secure its blessings, do establish this Constitution.

North Carolina (Adopted in 1876)

We, the people of the State of North Carolina, grateful to Almighty God, and the Sovereign Ruler of Nations, for the preservation of the American Union and the existence of our civil, political and religious liberties, and acknowledging our dependence upon Him for the continuance of these blessings to us and our posterity, do, for the more certain security thereof and for the better government of this State, ordain and establish this Constitution.

North Dakota (Adopted in 1889)

We, the people of North Dakota, grateful to Almighty God for the blessings of civil and religious liberty, do ordain and establish this Constitution.

Ohio (Adopted in 1851)

We, the people of the State of Ohio, grateful to Almighty God for our freedom, to secure its blessings and promote our common welfare, do establish this Constitution.

Appendix A

Oklahoma (Adopted in 1907)

Invoking the guidance of Almighty God in order to secure and perpetuate the blessings of liberty; to secure just and rightful government; to promote our mutual welfare and happiness, we the people of the State of Oklahoma, do ordain and establish this Constitution.

Oregon (Adopted in 1859)

All men shall be secured in the natural right to worship Almighty God according to the dictates of their own consciences.

Pennsylvania (Adopted in 1874)

We, the people of the Commonwealth of Pennsylvania, grateful to Almighty God for the blessings of civil and religious liberty, and humbly invoking His guidance, do ordain and establish this Constitution.

Rhode Island (Adopted in 1843)

We, the people of the State of Rhode Island and Providence Plantations, grateful to Almighty God for the civil and religious liberty which He hath so long permitted us to enjoy, and looking to Him for a blessing upon our endeavors to secure and to transmit the same unimpaired to succeeding generations do ordain and establish this Constitution of Government.

South Carolina (Adopted in 1895)

We, the people of the State of South Carolina, in convention assembled, grateful to God for our liberties, do ordain and establish this Constitution for the preservation and perpetuation of the same.

South Dakota (Adopted in 1889)

We, the people of South Dakota, grateful to Almighty God for our civil and religious liberties, in order to form a more perfect and independent government, establish jus-

tice, insure tranquillity, provide for the common defense, promote the generel welfare and preserve to ourselves and to our posterity the blessings of liberty, do ordain and establish this Constitution for the State of South Dakota.

Tennessee (Adopted in 1870)

That all men have a natural and indefeasible right to worship Almighty God according to the dictates of their conscience; that no man can of right, be compelled to attend, erect or support any place of worship, or to maintain any minister against his consent; that no human authority can, in any case whatever, control or interefere with the rights of conscience; and that no preference shall ever be given, by law, to any religious establishment or mode of worship.

Texas (Adopted in 1876)

Humbly invoking the blessings of Almighty God, the people of the State of Texas, do ordain and establish this Constitution.

Utah (Adopted in 1895)

Grateful to Almighty God for life and liberty, we, the people of Utah, in order to secure and perpetuate the principles of free government, do ordain and establish this Constitution.

Vermont (Adopted in 1793)

That all men have a natural and unalienable right, to worship Almighty God, according to the dictates of their own consciences and understandings, as in their opinion shall be regulated by the word of God; and that no man ought to or of right can be compelled to attend any religious worship, or erect or support any place of worship, or maintain any minister, contrary to the dictates of his conscience, nor can any man be justly deprived or abridged of

any civil right as a citizen, on account of his religious sentiments, or peculiar mode of religious worship; and that no authority can, or ought to be vested in, or assumed by, any power whatever, that shall in any case interefere with, or in any manner control the rights of conscience, in the free exercise of religious worship. Nevertheless, every sect or denomination of Christians ought to observe the Sabbath or Lord's day, and keep up some sort of religious worship, which to them shall seem most agreeable to the revealed will of God.

Virginia (Adopted in 1902)

That religion or the duty which we owe to our Creator, and the manner of discharging it, can be directed only by reason and conviction, not by force or violence; and, therefore, all men are equally entitled to the free exercise of religion, according to the dictates of conscience; and that it is the mutual duty of all to practice Christian forbearance, love and charity towards each other.

Washington (Adopted in 1889)

We, the people of the State of Washington, grateful to the Supreme Ruler of the Universe for our liberties, do ordain this Constitution.

Wisconsin (Adopted in 1848)

We, the people of Wisconsin, grateful to Almighty God for our freedom, in order to secure its blessings, form a more perfect government, insure domestic tranquillity and promote the general welfare, do establish this Constitution.

Wyoming (Adopted in 1889)

We, the people of the State of Wyoming, grateful to God for our civil, political and religious liberties, and desiring to secure them to ourselves and perpetuate them to our posterity, do ordain and establish this Constitution.

APPENDIX B

HOUSE OF REPRESENTATIVES

83D CONGRESS
2d Session

REPORT
No. 1633

AMENDING THE PLEDGE OF ALLEGIANCE TO THE FLAG OF THE UNITED STATES

MAY 28, 1954.—Referred to the House Calendar and ordered to be printed

---

Mr. JONAS of Illinois, from the Committee on the Judiciary, submitted the following

REPORT

[To accompany H. J. Res. 243]

The Committee on the Judiciary, to whom was referred the joint resolution (H. J. Res. 243) to amend the pledge of allegiance to the flag of the United States of America, having considered the same, report favorably thereon with an amendment and recommend that the joint resolution, as amended, do pass.

The Amendment is as follows:

Page 2, line 1, strike out the comma after the words "one Nation".

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PURPOSE

The act of June 22, 1942 (ch. 435, 56 Stat. 1074), as amended, relates to rules and customs pertaining to the display and use of the flag of the United States of America. Section 7 of that act contains the pledge of allegiance to the flag; and it is the purpose of this proposed legislation to amend that pledge by adding the words "under God" so as to make it read, in appropriate part, "one Nation under God, indivisible,".

STATEMENT

Since the introduction of this legislation the committee and a great number of the individual Members of Congress have received communications from all over the United States urging the enactment of this measure.

At this moment of our history the principles underlying our American Government and the American way of life are under attack by a system whose philosophy is at direct odds with our own. Our American Government is founded on the concept of the individuality and the dignity of the human being. Underlying this concept is the belief that the human person is important because he was created by God and endowed by Him with certain inalienable rights which no civil authority may usurp. The inclusion of God in our pledge therefore would further acknowledge the dependence of our people and our Government upon the moral directions of the Creator. At the same time it would serve to deny the atheistic and materialistic concepts of communism with its attendant subservience of the individual.

The Supreme Court ruled in 1892 that "this is a religious nation."[1] It reiterated this holding, more recently (1951), when it stated:

---

[1] *Church of the Holy Trinity* v. *U. S.* (1892) (143 U. S. 457, 470).

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> We are a religious people whose institutions presuppose a supreme being.[2]

Those words by our Supreme Court are true in a very fundamental and realistic sense. From the time of our earliest history our peoples and our institutions have reflected the traditional concept that our Nation was founded on a fundamental belief in God. For example our colonial forebears recognized the inherent truth that any government must look to God to survive and prosper. In the year 1620, the Mayflower compact, a document which contained the first constitution in America for complete self-government, declared in the opening sentence "In the name of God. Amen." This was an open recognition, by our forebears, of the need for the official conjunction of the laws of God and with the laws of the land.

It was William Penn who said: "Those people who are not governed by God will be ruled by tyrants."

Four years before the Declaration of Independence, we find George Mason arguing to the General Court of Virginia that—

> All acts of legislature apparently contrary to the natural right and justice are, in our laws, and must be in the nature of things considered as void. The laws of nature are the laws of God, whose authority can be superseded by no power on earth.

On July 4, 1776, our Founding Fathers proclaimed our Declaration of Independence which no less than four times refers to the existence of the Creator. It states in part:

> When in the Course of human events, it becomes necessary for one people to dissolve the political bands which have connected them with another and to assume among the powers of the earth, the separate and equal

---

[2] *Zorach* v. *Clauson* (1951) (343 U. S. 306, 313).

station to which the Laws of Nature and of Nature's God entitle them, a decent respect to the opinions of mankind requires that they should declare the causes which impel them to the separation.

We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty, and the pursuit of Happiness.

This same document appeals to "The Supreme Judge of the world that this Nation be free, and pledges our Nation to support the Declaration "with a firm reliance on the protection of divine Providence."

During the Presidency of Abraham Lincoln, the Congress passed the act of April 22, 1864, directing that the inscription "In God we trust" be placed on our coins. This avowal of faith has been imprinted on billions and billions of coins during the last 90 years.

Later at Gettysburg on November 19, 1863, Lincoln said:

> That we here highly resolve that these dead shall not have died in vain; that this Nation, under God, shall have a new birth of freedom, and that government of the people, by the people, for the people shall not perish from the earth:

Recently President Eisenhower joined with Bishop Fulton J. Sheen, Dr. Norman Vincent Peale, Rabbi Norman Salit, and the American Legion Commander, Arthur J. Connell, in the American Legion's Back to God appeal in connection with its Four Chaplains' Day, Commemorating the four military chaplains who heroically gave their lives when the troopship *Dorchester* was sunk in 1943. The President declared that "all the history of America" bears witness to the truth that "in time of test or trial we instinctively turn to God." "Today, as then (Gettysburg), there is need for positive acts of renewed recognition that faith is our surest • • • strength, our greatest resource."

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Representative Louis C. Rabaut who testified at the hearing before the subcommittee aptly stated the need for this legislation in the following words:

> By the addition of the phrase "under God" to the pledge, the consciousness of the American people will be more altered to the true meaning of our country and its form of government. In this full awareness we will, I believe, be strengthened for the conflict now facing us and more determined to preserve our precious heritage.
>
> More importantly, the children of our land, in the daily recitation of the pledge in school, will be daily impressed with a true understanding of our way of life and its origins. As they grow and advance in this understanding, they will assume the responsibilities of self-government equipped to carry on the traditions that have been given to us. Fortify our youth in their allegiance to the flag by their dedication to "one Nation, under God."

Since our flag is symbolic of our Nation, its constitutional government and the morality of our people, the committee believes it most appropriate that the concept of God be included in the recitations of the pledge of allegience to the flag. It should be pointed out that the adoption of this legislation in no way runs contrary to the provisions of the first amendment to the Constitution. This is not an act establishing a religion or one interfering with the "free exercise" of religion. A distinction must be made between the existence of a religion as an institution and a belief in the sovereignty of God. The phrase "under God" recognizes only the guidance of God in our national affairs. The Supreme Court has clearly indicated that the references to the Almighty which run thorugh our laws, our public rituals, and our ceremonies in no way flout the provisions of the first amendment (*Zorach* v. *Clauson* (343 U. S. 306,

312-313)). In so construing the first amendment, the Court pointed out that, if this recognition of the Almighty was not so, then even a fastidious atheist or agnostic could object to the way in which the Court itself opens each of its sessions, namely, "God save the United States and this Honorable Court" (id., 313).

Included as a part of this report is an opinion from the Legislative Reference Service of the Library of Congress, concerning the proper placement of the words "Under God" in the pledge of allegiance.

MAY 11, 1954.

To: Mr. Cyril F. Brickfield [Assistant Counsel], House Committee on the Judiciary.

Subject: Placing of the words "under God" in the pledge of allegiance.

The pledge of allegiance to the flag was recognized and codified by Congress in the Flag Code of 1942 (act of June 22, 1942, amended December 22, 1942, U. S. C. 36:172). The pledge law now reads: "I pledge allegiance to the flag of the United States of America and to the Republic for which it stands, one Nation indivisible, with liberty and justice for all."

Currently, several proposals are pending, to insert in this pledge the word "under God." These present several alternatives as to placement and punctuation:

(1) • • • Republic for which it stands, one Nation, under God, indivisible, with liberty • • •

(2) • • • Republic for which it stands, one Nation under God, indivisible, with liberty • • •

(3) • • • Republic for which it stands, one Nation indivisible under God, with liberty • • •

You have asked for a brief memorandum on the question of placement and punctuation, and whether the rules of grammar point to one form rather than

another. The present statement is limited to this narrow point. Of course, before any judgment can be expressed, the fundamental question must be met—what is the exact meaning intended by the proposed insertion? On this point, we have some remarks in the Congressional Record as a guide.

Representative Rabaut, who introduced Joint Resolution 243, explained his measure in the Congressional Record of February 12, 1954, page A-1115. "Unless we are willing to affirm our belief in the existence of God and His creator-creature relationship to man, we drop man himself to the significance of a grain of sand. * * * Children and Americans of all ages must know that this is one Nation which "under God" means "liberty and justice for all."

Senator Ferguson, who introduced Senate Joint Resolution 126, commented that "Our Nation was founded on a fundamental belief in God * * * communism, on the contrary, rejects the very existence of God." (See Congressional Record, April 1, 1954, p. A-2527.)

It seems unlikely, then, that the insertion is intended as a general affirmance of the proposition that the United States of America, is "founded on a fundamental belief in God." The new language should therefore be inserted, and punctuated, so as most clearly to indicate this general thought. Under the generally accepted rules of grammar, a modifier should normally be placed as close as possible to the word it modifies. In the present instance, this would indicate that the phrase "under God," being intended as a fundamental and basic characterization of our Nation, might well be put immediately following the word "Nation." Further, since the basic idea is a Nation founded on a belief in God, there would seem to be no reason for a comma after Nation: "one Nation under

God" thus becomes a single phrase, emphasizing precisely the idea desired by the authors noted above.

This reading, will be noted, substitutes the basic concept of "one Nation under God" for the phrase now in law, "one Nation indivisible"; and "indivisible" becomes a separate prime modifier.

In the alternative reading, "one Nation indivisible under God," the phrase "under God" would be the normal rules of grammar be read as modify "indivisible," rather than "Nation." By the same reasoning, in the reading "one Nation under God indivisible," indivisible would naturally be construed as modifying the word "God."

It may be noted in passing that as the expression is used in Lincoln's Gettysburg Address [that this Nation, under God, shall have a new birth of freedom • • •] the phrase "under God" seems to mean "with the help of God." Lincoln was solemnly asking his people to resolve that the Nation, with God's help, should have a new birth of freedom. The difference in context seems adequate reason for the punctuation as given.

W. C. GILBERT, *Assistant Director.*

CHANGES IN EXISTING LAW

In compliance with clause 3 of rule XIII of the House of Representatives there is printed below in roman type without brackets existing law in which no change is proposed by enactment of this bill: New provisions proposed to be inserted are shown in italic.

Appendix B

TITLE 28, UNITED STATES CODE

§ 172. PLEDGE OF ALLEGIANCE TO THE FLAG; MANNER OF DELIVERY

The following is designated as the pledge of allegiance to the flag: "I pledge allegiance to the flag of the United States of America and to the Republic for which it stands, one Nation *under God*, indivisible, with liberty and justice for all." Such pledge should be rendered by standing with the right hand over the heart. However, civilians will always show full respect to the flag when the pledge is given by merely standing at attention, men removing the headdress. Persons in uniform shall render the military salute.

APPENDIX C

1. THE MAYFLOWER COMPACT—41 pilgrims on the deck of the Mayflower in 1620 prepared the first written constitution of our land. It opened with these words: "In the name of God, Amen," and stated that the long and difficult voyage to the new world had been "undertaken for the glory of God." They signed it "solemnly and mutually in the presence of God."

2. THE LIBERTY BELL—When the bell was cast in 1751, these words of Moses were inscribed on it: "Proclaim liberty throughout the land unto all the inhabitants thereof." (Lev. 25:10)

3. DECLARATION OF INDEPENDENCE ON GOD—On June 12, 1775, a year before the signing of the Declaration of Independence, the Continental Congress officially called on all citizens to observe "the twentieth day of July next" to be set aside as a day of public humiliation, fasting and prayer; that we may, with united hearts and voices, unfeignedly confess and deplore our many sins, and offer up our joint supplications to the all-wise, omnipotent and merciful Disposer of all events . . ."

4. THE AMERICAN SEAL—On every dollar bill the seal is pictured with the "Eye of God" directly above the pyramid. The words "Annuit Coeptis" signify: "He (God) has favored our undertakings." Congress approved this design on June 20, 1782.

5. OATH OF OFFICE—The oath taken by government employees, witnesses in court and those seeking passports concludes with the prayerful petition: "So help me God." This practice was originated by George Washington when he took his first oath of office as President of the United States, April 30, 1789.

6. NORTHWEST ORDINANCE—This document played an important part in United States history. Congress passed it on July 13, 1787, and thereby established federal control of the territory west of the Allegheny Mountains and north of the Ohio River. It included this stipulation:

> "Religion, morality, and knowledge, being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged."

7. THANKSGIVING DAY—From its very start, our nation has set aside one day to render thanks to Almighty God. The Chief Executive officially asks each citizen to express gratitude to a bountiful Creator. In his proclamation for a national Thanksgiving Day, George Washington, shortly after his inauguration, said: "Whereas it is the duty of all nations to acknowledge the Providence of Almighty God, to obey His will, to be grateful for His benefits, and humbly to implore His protection and favor. I do recognize and assign Thursday, the 26th day of November next, to be devoted by the people of these states to the service of that great and glorious Being who is the beneficent Author of all the good that was, that is, or will be."

8. WASHINGTON'S ORDER REGARDING CHAPLAINS—On July 9, 1776, less than a week after the signing of the Declaration of Independence, General George Washington issued the following order:

> "The honorable Continental Congress having been pleased to allow a chaplain to each regiment, the colonels or commanding officers of each regiment are directed to procure chaplains accordingly, persons of good character and exemplary lives, and to see that all inferior officers and soldiers pay them a suitable respect. The blessings and protection of Heaven are at

all times necessary, but especially so in times of public distress and danger."

All branches of the U. S. Armed Services are now officially staffed by thousands of chaplains.

9. National Anthem—Francis Scott Key composed the "Star Spangled Banner" during the bombardment of Fort McHenry on the night of September 13, 1814. He scribbled it on an old envelope. For 117 years, this song was popular as a patriotic hymn. On March 3, 1931 Congress adopted the "Star Spangled Banner" as our national anthem . . . It closes with this reverent praise of God:

"Praise the Power that hath made and preserved us a nation.

Then conquer we must, when our cause it is just
And this is our motto—'In God is our Trust'."

10. Motto on Coins—During the Civil War, a Protestant minister, Rev. M. R. Watkinson of Ridleyville, Pa., wrote the Secretary of the Treasury, Salmon P. Chase, on Nov. 13, 1861, requesting "the recognition of the Almighty God on our coins." He concluded his letter to Mr. Chase with this petition: "This would put us openly under the Divine protection we have personally claimed. From my heart I have felt our national shame in disowning God as not the least of our present national disasters."

On Dec. 9, 1863, after several wordings and designs had been submitted, Mr. Chase instructed Mr. James Pollock, director of the U. S. Mint in Philadelphia, to start inscribing the words "In God We Trust" on all coins.

11. Every President Paid Tribute to God—All Presidents without exception, from George Washington

to Dwight D. Eisenhower, have publicly recognized the dependence of this nation on Almighty God. These excerpts are from some of their Inaugural Addresses:

WASHINGTON—" . . . in this first official act my fervent supplications to that Almighty Being Who rules over the universe . . ."

THOMAS JEFFERSON—" . . . acknowledging and adoring an overruling Providence . . . May that Infinite Power, . . . lead our councils to what is best . . ."

JAMES MADISON—" . . . in the guardianship and guidance of that Almighty Being Whose power regulates the destiny of nations . . ."

ANDREW JACKSON—" . . . a firm reliance on the goodness of that Power Whose Providence protected our national infancy and has since upheld our liberties in various vicissitudes . . ."

ABRAHAM LINCOLN—" . . . with firmness in the right as God gives us to see the light, let us strive on to finish the work we are in . . ."

WILLIAM HOWARD TAFT—" . . . I invoke . . . the aid of the Almighty God in the discharge of my responsible duties."

WOODROW WILSON—" . . . God helping me, I will not fail them . . ."

HERBERT HOOVER—" . . . I ask, the help of Almighty God in this service to my country . . ."

FRANKLIN D. ROOSEVELT—" . . . We humbly ask the blessing of God . . . May He guide me in the days to come . . ."

Appendix C

HARRY S. TRUMAN—". . . We believe that all men are created equal because they are created in the image of God . . ."

DWIGHT D. EISENHHOWER—". . . In our quest of understanding, we beseech God's guidance . . ."

12. NATIONAL MOTTO—A Joint Resolution was als adopted by Congress on July 20, 1956, establishing "In God we trust" as the national motto of the United States. Here are the words of the official resolution:

"Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, that the national motto of the United States is hereby declared to be 'In God we trust'."

13. TOMB OF UNKNOWN SOLDIER—In the National Cemetery at Arlington, Va., the official inscription on the tomb of the unknown soldier reads:

"Here lies in honored glory, an American soldier, known but to God."

14. NATIONAL MONUMENTS—They bear further tribute to the dependence of our country upon Almighty God.

WASHINGTON MONUMENT—The numerous spiritual inscriptions on its walls include these words of the Divine Master:

"Suffer the little children to come unto me and forbid them not, for of such is the kingdom of heaven." (Luke 18:16)

LINCOLN MEMORIAL—Near the massive statute of Abraham Lincoln, his words are chiseled into the granite wall:

Appendix C

". . . that this nation under God shall have a new birth of freedom, and that government of the people, by the people, for the people, shall not perish from the earth."

JEFFERSON MEMORIAL—The forceful words of Thomas Jefferson inscribed in the monument remind all who behold them of the dire results that may follow if we forget God is the Source of our Liberty:

"God who gave us life gave us liberty. Can the liberties of a nation be secure when we have removed the conviction that these liberties are the gift of God!"

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SUPREME COURT, U.S.

Supreme Court of the United States

October Term, 1961

Office-Supreme Court, U.S.
FILED
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JOHN F. DAVIS, CLERK

No. 468

In the Matter of the Application

of

STEVEN I. ENGEL, DANIEL LICHTENSTEIN, MONROE LERNER, LENORE LYONS and LAWRENCE ROTH,

Petitioners-Appellants,

against

WILLIAM J. VITALE, JR., PHILIP J. FREED, MARY HARTE, ANNE BIRCH and RICHARD SAUNDERS, constituting the Board of Education of Union Free School District Number Nine, New Hyde Park, New York,

Respondents-Respondents,

directing them to discontinue a certain school practice,

and

HENRY HOLLENBERG, ROSE LEVINE, MARTIN ABRAMS, HELEN SWANSON, WALTER F. GIBB, JANE EHLEN, RALPH B. WEBB, VIRGINIA ZIMMERMAN, VIRGINIA DAVIS, VIOLET S. COX, EVELYN KOSTER, IRENE O'ROURKE, ROSEMARIE PETELENZ, DANIEL J. REEHIL, THOMAS DELANEY and EDWARD L. MACFARLANE,

Intervenors-Respondents.

BRIEF OF SYNAGOGUE COUNCIL OF AMERICA AND NATIONAL COMMUNITY RELATIONS ADVISORY COUNCIL AS *AMICI CURIAE*

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Intervenors-Respondents.

BRIEF OF SYNAGOGUE COUNCIL OF AMERICA AND NATIONAL COMMUNITY RELATIONS ADVISORY COUNCIL AS *AMICI CURIAE*

Interest of the *Amici*

This brief is submitted on behalf of the Synagogue Council of America and the National Community Relations Advisory Council pursuant to leave granted by the Court on March 5, 1962.

The Synagogue Council of America is a co-ordinating body consisting of the organizations representing the three divisions of Jewish religious life: Orthodox, Conservative and Reform. It is composed of:

Central Conference of American Rabbis, representing the Reform rabbinate;

Rabbinical Assembly of America, representing the Conservative rabbinate;

Rabbinical Council of America, representing the Orthodox rabbinate;

Union of American Hebrew Congregations, representing the Reform congregations;

Union of Orthodox Jewish Congregations of America, representing the Orthodox congregations;

United Synagogue of America, representing the Conservative congregations.

The National Community Relations Advisory Council is a co-ordinating body comprised of the following national lay Jewish organizations, in addition to the congregational bodies mentioned above, concerned with American Jewish community relations:

American Jewish Congress

Jewish Labor Committee

Jewish War Veterans of the United States

and sixty-one local Jewish Community Councils, including all the major cities in the United States.[1]

The organizations affiliated with the Synagogue Council of America and the National Community Relations Advisory Council include in their membership the overwhelming majority of Americans affiliated with Jewish organizations.

The organizations submitting this brief are committed to the belief that the absolute separation of church and state is the surest guaranty of religious liberty and has proved of inestimable value both to religion and to the community generally. We believe also that above all other institutions our public schools must be kept free of sectarian strife and involvement in religious practices and teachings.

For these and other reasons, we submitted a brief in *McCollum* v. *Board of Education of Champaign, Ill.*, 333

1. The constituent Community Councils are the following: Jewish Welfare Fund of Akron; Albany Jewish Community Council; Atlanta Jewish Community Council; Federation of Jewish Charities of Atlantic City, N. J.; Baltimore Jewish Council; Jewish Community Council of Metropolitan Boston; Jewish Community Council, Bridgeport, Conn.; Brooklyn Jewish Community Council; Jewish Federation of Broome County, N. Y.; Community Relations Committee of the Jewish Federation of Camden County, N. J.; Jewish Community Federation, Canton, Ohio; Central Florida Jewish Community Council; Cincinnati Jewish Community Relations Committee; Jewish Community Federation, Cleveland, Ohio; United Jewish Fund and Council of Columbus, Ohio; Connecticut Jewish Community Relations Council; Jewish Federation of Delaware; Jewish Community Council of Metropolitan Detroit; Eastern Union County, N. J., Jewish Community Council; Jewish Community Council of Easton and Vicinity; Erie Jewish Community Welfare Council; Jewish Community Council of Essex County, New Jersey; Jewish Community Council of Flint, Mich.; Jewish Federation of Fort Worth, Tex.; Community Relations Committee of the Hartford (Conn.) Jewish Federation; Jewish Community Council of Metropolitan Houston, Texas; Indiana Jewish Community Relations Council; Indianapolis Jewish Community Relations Council; Jewish Community Council, Jacksonville, Florida; Community Relations Bureau of the Jewish Federation and

U. S. 203 (1948). Because the decision of the New York courts in the present case challenges the continued validity of the principles declared in the *McCollum* case, we have sought and obtained the leave of the Court to submit this brief *amici curiae*.

Statement of the Case

This Court has granted certiorari to review a decision of the New York Court of Appeals which affirmed lower court decisions upholding the validity of the action of the Respondent School Board in instituting the practice of daily recitation in the public schools of the so-called "Regents' Prayer." The text of this prayer is as follows:

> "Almighty God, we acknowledge our dependence upon Thee, and we beg Thy blessings upon us, our parents, our teachers and our Country."

Council of Greater Kansas City; Kingston, N. Y., Jewish Community Council; Community Relations Committee of the Jewish Federation—Council of Greater Los Angeles; Jewish Community Relations Council of Memphis; Milwaukee Jewish Council, Jewish Community Relations Council of Minnesota; Nashville Jewish Community Council; Jewish Federation of New Britain, Conn.; New Haven Jewish Community Council; Norfolk Jewish Community Council; Jewish Community Relations Council of Oakland, Calif.; Jewish Community Council of Paterson, N. J.; Jewish Community Council of Peoria, Ill.; Jewish Community Council, Perth Amboy, N. J.; Jewish Community Relations Council of Greater Philadelphia; Jewish Community Relations Council, Pittsburgh; Jewish Federation of Portland, Maine; Richmond Jewish Community Council; Jewish Community Council, Rochester, N. Y.; Jewish Community Relations Council of St. Louis; Community Relations Council of San Diego; San Francisco Jewish Community Relations Council; Jewish Community Council, Schenectady, N. Y.; Scranton-Lackawanna Jewish Council; Jewish Community Council of Toledo; Jewish Federation of Trenton; Tulsa Jewish Community Council; Jewish Community Council, Utica; Jewish Community Council of Greater Washington (D.C.); Jewish Federation of Waterbury; Wyoming Valley Jewish Committee; Jewish Community Relations Council of the Jewish Federation of Youngstown, Ohio.

Constitutional Provisions Involved

The First Amendment to the United States Constitution provides in part:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof * * *."

The first section of the Fourteenth Amendment to the United States Constitution provides, in part:

> "* * * nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Question Presented

The question presented to this Court is the constitutionality under the First and Fourteenth Amendments of the public school sponsored and conducted daily collective recitation of this prayer. Not involved in this case is the right of individual children to engage in private or individual prayer during public school hours in a manner which does not interfere with the regular conduct of public school operations. The constitutional issue in this case arises from the fact that state authorities formulated the prayer and have sponsored, promoted and supervised its collective recitation by the children as part of the regular daily activities of the public school day.

Summary of Argument

A lengthy opinion was written by the Special Term of the Supreme Court of New York. A majority of the Appellate Division affirmed the Special Term's decision on the basis of this opinion. In the Court of Appeals, however, three separate opinions for affirmance were written, no one of which received the acceptance of a majority of the Court. It is, therefore, not possible to state precisely on what particular ground the action of the Board of Education was sustained. As best we can judge from the various opinions, the action was sustained on four separate but somewhat related grounds:

(1) The prayer formulated by the Board of Regents of the State of New York is "non-sectarian," i.e., it is acceptable to all faiths and is preferential to none. Its recitation in concert by the children may constitutionally be made part of the daily public school program since the purpose of the First Amendment is only to preclude preferential treatment of some religions over others.

(2) Since provision is made for excusing from participation any child whose parents object to the recitation of the prayer, there is no infringement upon the First Amendment.

(3) The First Amendment is made applicable to the States by virtue of the Due Process clause of the Fourteenth. Public school recitation of prayer is a long-standing practice going back many years. A practice which has continued so long in time cannot be held to be wanting in due process.

(4) We are a religious people. Those who wrote our Constitution were the friends of religion. Exclusion of prayer from the public school curriculum manifests a hos-

tility to religion, and such motivation cannot reasonably be ascribed to the framers of our Constitution.

We submit that each of these grounds is erroneous. The prayer involved in this case is not "non-sectarian," for indeed no prayer can be truly non-sectarian. In any event, whatever may be the applicable rule under State law, the First Amendment, as interpreted by this Court, recognizes no distinction between sectarian and non-sectarian religion. All religious practices are equally barred in the public schools.

Nor is it constitutionally determinative that children of objecting parents may be excused from participation. In the first place, the privilege of non-participation is, by reason of the nature of the public school system and of children, illusory rather than real. In the second place, even if the privilege of non-participation immunizes the practice from invalidation under the "free exercise" clause of the First Amendment, the practice still infringes upon the Amendment's ban on laws respecting an establishment of religion.

The particular prayer here involved is of recent vintage. But even if the practice of communal prayer in public schools is of long duration, that fact does not render it constitutional. We would need no Constitution if whatever is necessarily ought to be.

Exclusion of communal prayer from the public school curriculum does not manifest a hostility towards religion, any more than does any application of the principle of the separation of church and state. Hence, such exclusion cannot be said to be contrary to the intent of those who framed the First and Fourteenth Amendments.

ARGUMENT

I. The action of the Respondent Board of Education constitutes a prohibited law respecting an establishment of religion.

A. The applicability of the First Amendment to the States

It is no longer open to question that the religion clause of the First Amendment to the Federal Constitution is applicable to the States no less than to the Federal Government. Moreover, its applicability extends equally to the no establishment and the free exercise provisions. The States and the Federal Government are therefore equally forbidden to enact or enforce any laws respecting an establishment of religion or prohibiting its free exercise. *Cantwell* v. *Connecticut*, 310 U. S. 296; *Murdock* v. *Pennsylvania*, 319 U. S. 105; *Marsh* v. *Alabama*, 326 U. S. 501; *Everson* v. *Board of Education*, 330 U. S. 1; *McCollum* v. *Board of Education*, 333 U. S. 203; *Kedroff* v. *St. Nicholas Cathedral*, 344 U. S. 94.

B. The meaning of the no establishment clause

Four times within the past fifteen years this Court has spelled out the meaning of the no establishment clause in definitive terms. In the *Everson* case, *supra*, at pp. 15-16, again in the *McCollum* case, *supra*, at pp. 210-211; and yet again in *McGowan* v. *Maryland*, 366 U. S. 420 at 443, and finally within the past year again in *Torcaso* v. *Watkins*, 367 U. S. 488, at 493, this Court said:

> The "establishment of religion" clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force

> nor influence a person to go to or remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and vice versa. In the words of Jefferson, the clause against establishment of religion by law was intended to erect "a wall of separation between church and State."

If anything can be said to be settled in constitutional law it is that the First Amendment's no establishment clause means what this paragraph says it means. Measured by the standards thus set forth, the decision of the courts below, we submit, cannot stand.

C. The Regents' Prayer as preferential treatment

The courts below sought to meet the challenge based upon the ban on preferential treatment in the quoted paragraph by stressing the "non-sectarian" nature of the Regents' Prayer.[2] The error in this approach is twofold: First, the officially promoted acknowledgment of dependence upon God and the invocation of His blessings constitute a preference of theistic religions over non-theistic ones and, secondly, the engaging in public prayer constitutes a preference of those faiths which sanction the practice over those to which it is offensive.

2 See, e.g., opinion of Judge Froessel: "Here no partiality shown * * *. It [the prayer] * * * is clearly nonsectarian in language." 10 N. Y. 2d 174, at 183.

The acknowledgment of dependence upon Almighty God and the prayer to Him for His blessings necessarily constitute official assertion by the public school officials of the existence of a personal God who can and will respond to prayer and grant the blessings prayed for. This official assertion of a belief in the existence of God prefers some religions over others, specifically theistic religions over those which are non-theistic.

Nor is the "Regents' Prayer" acceptable to all religions that posit the existence of a personal God. For example, even among theistic religions, there are innumerable varieties and gradations of creed and doctrine concerning: (1) the very possibility of the Deity's present intervention in the course of creation (theologically denominated "special providence") and the conditions under which special providence may be hoped for without irreverance; (2) the propriety of addressing prayers to the Deity that seek to sway or influence the exertions of divine will; and (3) the propriety of assuming that the Deity, in dispensing blessings, can be induced to recognize the political boundaries of a specific country.

It is frequently assumed that all religions are founded upon a belief in the existence of a personal God. That is not so. So great a religion as the Buddhist religion with over 150 million adherents throughout the world including the United States (*World Almanac*, 1962, p. 719) is not founded upon a belief in the existence of God. Rhys-Davis, "Buddhism," in *Religious Systems of the World*, p. 142; Spielberg, *Living Religions of the World*, p. 247; Alabaster, *The Wheel of the Law*, p. XXXVII.

In *Washington Ethical Society* v. *District of Columbia*, 249 F. 2d 127, the United States Court of Appeals for the District of Columbia held unanimously that the Ethical Culture Society is a religious society and that Ethical Culture is a religion although it does not require "a belief and teaching of a Supreme Being who controls the universe." The Court ruled that a statute granting tax

exemption to "religious societies" must be construed to include the Ethical Culture Society. Indeed, the Court said, "To construe exemptions so strictly that unorthodox or minority forms of worship would be denied the exemption benefits granted to those conforming to majority beliefs may well raise constitutional issues." As this Court pointed out in *Torcaso* v. *Watkins*, 367 U. S. 488: "Among religions in this country which do not teach what would generally be considered a belief in the existence of God are Buddhism, Taoism, Ethical Culture, Secular Humanism and others."

Since religion may be non-theistic as well as theistic, governmental action which acknowledges dependence upon and asserts the existence of a personal God constitutes preferential treatment of some religions over others and is therefore unconstitutional. *Torcaso* v. *Watkins*, *supra*; *Fowler* v. *Rhode Island*, 345 U. S. 67. This Court's language in the *Torcaso* case is specific and unambiguous:

> We repeat and again reaffirm that neither a State nor the Federal Government can constitutionally force a person "to profess a belief or disbelief in any religion." Neither can constitutionally pass laws nor impose requirements which aid all religions as against non-believers, and neither can aid those religions based on a belief in the existence of God as against those religions founded on different beliefs.

Even among those who believe in the existence of a personal God, the Regents' Prayer cannot be said to be non-sectarian. Indeed, no prayer publicly and collectively recited can be said to be non-sectarian.

Experience has shown that sooner or later so-called non-denominational religious exercises acquire sectarian additions and deviations. Moreover, what is non-denominational to the majority frequently is sectarian to the minority. Many Protestant public school authorities have designated

non-denominational the King James version of the Bible, which is unacceptable to Catholics, and the Lord's Prayer, which is unacceptable to Jews.

Children of different religions pray in different ways. Some kneel and cross themselves, some clasp their hands and bow their heads. Some pray with head covered and some with head uncovered. And to some all public oral prayer is objectionable.[3]

D. The Regents' Prayer as aid to all religions

Even if the Regents' Prayer were truly non-sectarian, its collective recitation under public school sponsoring would still be unconstitutional. The First Amendment, the Court held in *Everson*, *McCollum*, *McGowan* and *Torcaso*, as well as in *Zorach* v. *Clauson*, 343 U. S. 306, imposes upon government an obligation of neutrality not merely as between competing sects and faiths, but also as between religion and non-religion. Under the principles set forth in these cases, a government not only may not aid one religion or prefer one religion over another, but also may not "aid all religions."

3. The Quakers or Friends are the best known religious denomination which rejects all institutionalized or collective prayer. In the "Epistle to the Reader" prefixed to the "Great Mistery," of George Fox, the founder of the Quaker movement, Edward Burrough, who became a Quaker in 1652, wrote (cited in Hastings, Encyclopedia of Religion and Ethics (1914), Vol. VI, p. 143):

> In all things we found the light which we were enlightened with all * * * and so we ceased from the teachings of all men, and their words and their worship and their temples and all their Baptismes, and their Churches * * * and we met together often, and waited upon the Lord in pure silence, from our own words and all men's words and hearkened to the voice of the Lord * * * and while waiting upon the Lord in silence as often we did for many hours together * * * we received often the pouring down of the spirit upon us and we spake with new tongues, as the Lord gave us utterance and as his spirit led us * * *.

The application of this principle was spelled out in the *McCollum* case, wherein this Court said (333 U. S., at 207n):

> Appellant, taking issue with the facts found by the Illinois courts, argues that the religious education program in question is invalid under the Federal Constitution for any one of the following reasons: (1) In actual practice certain Protestant groups have obtained an overshadowing advantage in the propagation of their faiths over other Protestant sects * * *
>
> In view of our decision we find it unnecessary to consider these arguments or the disputed facts upon which they depend.

It is our contention that the prayer complained of in this suit accords to theistic faiths governmental advantages not enjoyed by non-theistic faiths or indeed certain theistic faiths. But *McCollum* and *Torcaso* make it clear that, even if all religions were equally accorded the favors of the public school system, the prohibitions of the First Amendment would be violated by the practice here challenged. That amendment imposes upon the state a mandate not merely of impartiality among competing faiths, but neutrality as between religion and non-religion. As the Court said in the *McCollum* case: "* * * a state cannot consistently with the First and Fourteenth Amendments utilize its public school system to aid any *or all* religious faiths or sects in the dissemination of their doctrines and ideals * * *." 333 U. S. at 211. The same thought was earlier expressed by the Court in the *Everson* case in its statement that the First Amendment "requires the state to be a neutral in its relations with groups of religious believers and non-believers * * *." 330 U. S. at 18.

Here too the conclusion is fortified by the *Zorach* case. There the released time statute and regulations that were attacked expressly provided that the program could be availed of by any "duly constituted religious body." 343

U. S. at 308n. Were the critical issue to have been sectarianism as against non-sectarianism, or aid to some religions as against aid to all religions, the provision for equality among all duly constituted religions would have then and there decided the controversy and there would have been no need for the Court to consider anything else. The Court would not have found it necessary to stress the fact that, "unlike *McCollum*," the released time program did not involve "religious instruction or devotional exercises" within public school classrooms (343 U. S. at 308-9). The Court could instead have simply relied upon the statutory provision for equality among all duly constituted religious bodies and have decided the case on that point. The fact that it did not do so establishes clearly that the non-preferential or non-sectarian aspect of the program was not deemed by the Court to be determinative.

It follows, therefore, that in the present case even if the Regents' Prayer were truly non-sectarian—which, we repeat, it is not—its collective recitation would nevertheless be unconstitutional as a law respecting an establishment of religion as that term has been defined by this Court.

II. The privilege of non-participation does not save the challenged practice from constitutional invalidity under the First Amendment.

A. Compulsion and voluntariness

While the issue of voluntariness vs. compulsion is perhaps relevant in respect to the attack on the practice involved in the present suit under the free exercise aspect of the First Amendment, it is completely irrelevant in respect to the establishment aspect. Here the critical test is not compulsion (although in respect to religious practices or teachings compulsion would violate the establishment ban as well as the free exercise guaranty), but state

aid to religion. Hence, even if pupil participation in the prayer were entirely voluntary—which we deny—the First Amendment's ban on establishment would still be violated by the aid accorded religion by the State through its public school system and by State participation in religious affairs.

This is one of the vital points of this case. It was stated clearly and unambiguously in this Court's opinion in the *McCollum* case. There the Court said:

> Appellant, taking issue with the facts found by the Illinois courts, argues that the religious education program in question is invalid under the Federal Constitution for any one of the following reasons: * * *
> (2) the religious education program was voluntary in name only because in fact subtle pressures were brought to bear on the students to force them to participate in it; * * *
>
> *In view of our decision we find it unnecessary to consider these arguments* or the disputed facts upon which they depend. 333 U. S. 203 at 207n. (Emphasis added.)

With only one Justice dissenting, the Court held that the involvement by the Champaign public school authorities in religious education and practice was unconstitutional whether pupil participation was in fact voluntary or involuntary. The reason for this is that the Court found the Champaign program unconstitutional under the establishment ban and therefore did not find it necessary to consider the free exercise guaranty.

It is important to note that nothing in the *Zorach* case impairs the validity of this holding. On the contrary, the Court in *Zorach* went out of its way to make it clear that it was reaffirming, not overruling, *McCollum*. The majority opinion specifically stated "*no religious exercise or instruction is brought to the classrooms of the public*

schools." The public school, the opinion stated, "can close its doors or suspend its operations as to those who want to repair to their religious sanctuary for worship or instruction. *No more than that is undertaken here.*" 343 U. S. at 311, 314. (Emphasis added.)

Thus, both *McCollum* and *Zorach* make it clear that, whatever may be the law in respect to "religious exercise or instruction" in the respective religious sanctuaries of the various faiths, "religious exercise or instruction" may not be "brought to the classrooms of the public schools," irrespective of any specific proof of compulsion or other non-voluntariness.

B. Establishment, free exercise and compulsion

The definitive interpretation of the establishment clause set forth in the *Everson*, *McCollum*, *McGowan* and *Torcaso* decisions, which we have quoted above, makes it clear that compulsion may effect a violation of that clause as well as of the free exercise clause. But not all compulsion necessarily violates the establishment ban; there are certain types of compulsion which will not constitute a law respecting an establishment of religion, and yet constitute one prohibiting the free exercise thereof.

The test, as elicited from the relevant decisions of this Court, is as follows: If compulsion is exercised to impel participation in *religious* conduct, it constitutes a law respecting an establishment of religion as well as one prohibiting the free exercise thereof. If, on the other hand, it impels participation in *secular* conduct, it can only be a law prohibiting the free exercise of religion.

Thus, as the cited cases state, it would be a violation of the establishment ban to "force * * * a person to go to * * * church * * * or * * * to profess a belief or disbelief in any religion." Going to church and professing belief in religion are obviously religious acts and coerced participation establishes religion no less than it prohibits its free exercise.

On the other hand, non-polygamous marriages (*Reynolds* v. *United States*, 98 U. S. 145); military training (*Hamilton* v. *Regents of the University of California*, 293 U. S. 245); vaccination (*Jacobson* v. *Massachusetts*, 197 U. S. 11); saluting the American flag and pledging allegiance to it (*West Virginia State Board of Education* v. *Barnette*, 319 U. S. 624), abstaining from labor one day weekly (*McGowan* v. *Maryland*, *supra*) are all deemed by the general community and the courts to be secular rather than religious matters and compulsion with respect to them does not violate the ban on establishment of religion, although it may (or may not) violate the ban on laws prohibiting the free exercise of religion.

The distinction is a critical one. For if the act is secular it is within the constitutional competence of the State, and therefore the sole question remaining is whether a particular religiously motivated person has a constitutional right under the free exercise clause to be excused from participating therein. (This, according to a majority of this Court, depends upon the balancing of the secular needs of the community against the religious rights of the individual, and is not involved in the present case.) On the other hand, if the conduct is religious, then it is outside the competence and jurisdiction of the State or its instrumentalities, and even if participation were not compulsory the conduct would be unconstitutional.

It follows from this that the appropriate remedy will differ in the two types of cases. If only free exercise is involved in that the conduct is secular, the sole right of the religiously-motivated dissenter is to be excused from participation, but not to have the practice terminated. Conversely, if establishment is involved in that the conduct is religious, the constitutional redress is not to excuse the dissenter but to discontinue the practice (for the State has no constitutional power to enter into it in the first place).

An examination of the *Barnette*, *Everson*, *McCollum*, *Zorach*, *McGowan* and *Torcaso* cases, *supra*, will illustrate this distinction. In *Barnette*, the Court held that children of Jehovah's Witnesses could not be compelled by public school authorities to participate in the flag salute ceremony. Such coercion, it was held, prohibited the free exercise of their religion in a manner forbidden by the Constitution. Since, however, the ceremony is generally deemed a patriotic or secular one, rather than a religious one, there was no suggestion that the public school authorities were required to discontinue it as part of the regular public school program.

In *Everson*, the Court by a vote of 5 to 4, upheld the use of public funds to transport children by bus to private and parochial schools. The majority held that this was secular conduct whose purpose it was to protect children from the hazards of the road. (The Court interpreted the challenged statute to apply to all private schools, secular as well as religious.) Hence, there was no violation of the establishment ban, even though the public funds so expended were raised by compulsory taxation of citizens.

In *McCollum*, the conduct complained of was clearly religious. Hence, the Court did not issue a judgment which would simply have secured the right of the plaintiff's child not to participate in the religious program, but decreed that the conduct should be discontinued and eliminated.

In *Zorach*, a majority of the Court held that the gravamen of the plaintiffs' complaint was that public school sessions continued while off-premises religious instruction was taking place. Under this analysis of the case, the Court held that there was no violation of the establishment ban since the conduct—continuation of secular instruction—was purely non-religious.

In *McGowan*, the majority of the Court held that the present purpose of the challenged Sunday laws was to assure a common day of rest, recreation and family to-

getherness. This is obviously a secular purpose and the laws were therefore held not to violate the non-establishment clause.

In *Torcaso* v. *Watkins*, on the other hand, the purpose of requiring affirmation of a belief in the existence of God was clearly and exclusively religious. Hence, this Court held it beyond the competence of the State under the First Amendment.

In the present case, too, it is neither denied nor deniable that the purpose of the action of the Board of Education is religious. Being so, it is beyond the State's constitutional competence, and violates the no-establishment clause even if participation were entirely voluntary.

C. The fiction of voluntariness

We submit that the privilege of non-participation does not render the challenged practice voluntary or immune from invalidation under the free exercise clause of the First Amendment.

Non-physical coercion is well recognized in Anglo-American law. The concepts of "undue influence" in equity jurisprudence and the law of wills and testaments are illustrations of every-day applications of the principle that psychological coercion can be as effective in reality and as amenable to redress in law as physical coercion. A psychologically coerced confession is as inadmissible in a criminal case as one procured through physical force. *Chambers* v. *Florida*, 309 U. S. 227; *Malinski* v. *New York*, 324 U. S. 401; *Leyra* v. *Denno*, 347 U. S. 556.

In the area of the relationship of church and state, there is ample authority for giving judicial recognition and legal effect to non-physical coercion. In the *Everson* and *McCollum* cases, the Court stated that under the First Amendment a State may not only not "*force*" a person to participate in a religious act or profess a religious belief, but it likewise may not "*influence*" him to do so.

Particularly where children are involved, and particularly in respect to children who are in the public schools by the compulsion of law, non-physical coercion must be recognized as a dominant factor and a strong "influence." This was recognized by the four Justices joining in the concurring opinion of Mr. Justice Frankfurter in the *McCollum* case (333 U. S. at 227):

> * * * That a child is offered an alternative may reduce the constraint; it does not eliminate the operation of influence by the school in matters sacred to conscience and outside the school's domain. The law of imitation operates, and non-conformity is not an outstanding characteristic of children. The result is an obvious pressure upon children to attend * * *.

Other courts have recognized that the nominal privilege of non-participation in religious practices does not eliminate the element of "force or influence" or remove the punishment "for entertaining or professing religious beliefs or disbeliefs." Thus, 50 years ago, the Supreme Court of Illinois rejected the argument that pupils were free to exclude themselves from religious practices in the following words:

> That suggestion seems to us to concede the position of the plaintiffs in error. The exclusion of a pupil from this part of the school exercises in which the rest of the school joins, separates him from his fellows, puts him in a class by himself, deprives him of his equality with the other pupils, subjects him to a religious stigma and places him at a disadvantage in the school, which the law never contemplated. All this is because of his religious belief. *People ex rel. Ring* v. *Board of Education*, 245 Ill. 334, 351.

Twenty years earlier, the Supreme Court of Wisconsin made a similar observation:

When * * * a small minority of the pupils in the public school is excluded, for any cause, from a stated school exercise, particularly when such a cause is apparent hostility to the Bible which a majority of the other pupils have been taught to revere, from that moment the excluded pupil loses caste with his fellows, and is liable to be regarded with aversion and subjected to reproach and insult. But it is a sufficient refutation of the argument that the practice in question tends to destroy the equality of the pupils which the constitution seeks to establish and protect, and puts a portion of them to serious disadvantage in many ways with respect to the others. *State ex rel. Weiss* v. *District Board*, 76 Wis. 177, 199-200.

An Iowa court came to the same necessary conclusion:

Conceding, for argument's sake, that such attendance was voluntary, in the sense that no requirement or command was laid upon non-Catholic pupils to attend or take part in such exercises, yet, surrounded as they were by a multitude of circumstances all leading in that direction, impelled by the gregarious instincts of childhood to go with the crowd, and impressed with a sense of respect for their teachers, whose religious principles and church affiliation were unceasingly pressed upon their notice by their religious dress and strictly ordered lives, could a responsible person expect the little handful of children from non-Catholic families to do otherwise than to enter the invitingly opened door of the church, and receive, with their companions, the instructions there given? *Knoblauch* v. *Kromer*, 182 Iowa 691, 699-700.

See also: *Kaplan* v. *Independent School District of Virginia*, 171 Minn. 142, 155-156, dissenting opinion:

> To excuse some children is a distinct preference in favor of those who remain and is a discrimination against those who retire. The exclusion puts a child in a class by himself. It makes him religiously conspicuous. It subjects him to religious stigma. It may provoke odious epithets. His situation calls for courage.

The most searching examination of the claim of voluntarism in respect to introduction of religious practices in the public school program was made in the case of *Tudor v. Board of Education of the Township of Rutherford*, 14 N. J. 31, 100 A. 2d 857, cert. denied 348 U. S. 816. There, speaking for a unanimous court, Chief Justice Vanderbilt, after examining the various authorities, overruled the contention of voluntarism on the ground that it "ignores the realities of life."

The Court's opinion contains the following (14 N. J. 31 at 50):

> Prof. Isidore Chein, Supervisor of Psychology and Acting Director of the Research Center for Mental Health at New York University, testified on behalf of the plaintiff:
>
> > "* * * I would expect that a slip of this kind, distributed under the authority of the school, would create a subtle pressure on the child which would leave him with a sense that he is not quite as free as the statement on that slip says; in other words, that he will be something of an outcast and a pariah if he does not go along with this procedure."
> >
> > "* * * I think that they would be in a situation where they have to play along with this or else feel themselves to be putting themselves in a public position where they are different, where they are not the same as other people, and the whole pressure would exist on them to conform."

There was a time when compulsion to participate in prayer recitation or other religious practices in the public schools was more patent and direct. On one occasion, before the Civil War, a hundred Catholic children were expelled from a Boston public school for refusal to participate. Whipple, *The Story of Civil Liberty in the United States*, p. 64 (1927). In Indiana, in the 1890's, a Catholic girl who refused to learn a chapter from the Bible as required but recited "Maud Muller" instead was kept after school day after day in what turned out to be a vain attempt to force her to violate her religious scruples. Beale, *A History of Freedom of Teaching in American Schools* (1941). Today, compulsion and pressure are more subtle and circumstantial but are no less present.

Children of minority religious groups particularly are faced with a dilemma whenever religion intrudes upon the public school—a dilemma which is always hard and frequently is cruel. They must either subject themselves to being singled out as non-conformists or they must participate in religious practices and teachings at variance with what they learn at home or in their religious schools. It is understandable that not infrequently some of them choose the second alternative as the lesser evil, and that Catholic and Jewish children will participate in Protestant religious practices in violation of their religious convictions and upbringing rather than subject themselves to the pain of not belonging.

We submit that under the guaranty of separation and religious freedom, American children may not be placed in this dilemma by public school authorities. They may not be compelled to choose between being forced or influenced to profess a religious belief or disbelief and being punished for refusing to profess such belief or disbelief. It was to avoid the oppression and bitterness which Old World experience had shown to be an inevitable concomitant of governmental intrusion in religion, that the fathers of our country gave constitutional protection to the principle

that "religion is wholly exempt from [government's] cognizance." *Madison's Memorial and Remonstrance Against Religious Assessment*, annexed as Appendix to *Everson*, 330 U. S. at 63. Religious compulsion and oppression, we submit, should not be allowed in the public schools even in a mild or subtle form.

The challenged practice requires school children to engage in an act of worship which conflicts with the conscience of some of them. The very bringing of this suit is proof of that fact. This Court should not place the seal of approval on such oppression.

III. The long standing of the practice of public school prayer is not constitutionally determinative.

The opinion of the Supreme Court at Special Term lays great stress on the fact that collective prayer in public schools is a long-standing practice (although concededly the Regents' Prayer is a comparatively recent innovation). From this the conclusion was drawn that it was not violative of due process.

This sanctification of the status quo is, we submit, erroneous. Due process does not mean that whatever is must necessarily continue to be.

Extended discussion of this ground for upholding the action of the Board of Education is not necessary here. The same assertion was made in *McCollum* and again in *Torcaso*. It was also made in a different context in *Brown* v. *Board of Education*, 347 U. S. 483. In all cases it was rejected.

In *McCollum*, this Court invalidated a practice, released time, that had been widely followed in the public schools of the country since 1914. Mr. Justice Frankfurter took occasion to say, in his concurring opinion, that "to the extent that aspects of these programs are open to Constitutional objection, the more extensively the movement

operates, the more ominous the breaches in the wall of separation" (333 U. S. at 225).

In *Brown* v. *Board of Education*, *supra*, the fact that racial segregation in the public schools had been universally practiced for as long as the Fourteenth Amendment had been part of the Constitution did not require a holding that it was sanctioned by the Constitution. Similarly, here the fact that prayer recitation is long-standing in many (but far from all or even most) schools does not require a holding that it is constitutionally permissible.

IV. The exclusion of collective prayer from the public school program does not manifest a hostility to religion.

Throughout the prevailing opinions of the court below is found the *motif* that exclusion of collective prayer is an act of hostility to religion and therefore could never have been intended by the framers of the First Amendment. This is most emphatically stated in the following language from the opinion of Judge Burke (10 N. Y. 2d 174, at 184):

> There is no language in the amendment which gives the slightest basis for the interpolation of a Marxist concept that mandates a prescribed ethic. According to the opinion, the separation of church and State which was intended to encourage *religious* interests among our people would become the constitutional basis for the *compulsory exclusion of any religious element* and the consequent promotion and advancement of atheism. It is not mere neutrality to prevent voluntary prayer to a Creator; it is an interference by the courts, contrary to the plain language of the Constitution, on the side of those who oppose religion.

This equation of opposition to religious practices in the public school with opposition to religion is unfortunately widespread. But its being widespread does not make it true.

This brief is submitted on behalf of the coordinating bodies of 70 Jewish organizations, including the national bodies representing congregations and rabbis of Orthodox, Conservative and Reform Judaism. The thousands of rabbis and congregations who have authorized the submission of this brief can hardly be characterized as being "on the side of those who oppose religion." Many Christian groups and publications have similarly expressed opposition to the Regents' Prayer.

The same argument was asserted in the *McCollum* case and the Court disposed of it in the following language (at pp. 211-212):

> To hold that a state cannot consistently with the First and Fourteenth Amendments utilize its public school system to aid any or all religious faiths or sects in the dissemination of their doctrines and ideals does not, as counsel urge, manifest a governmental hostility to religion or religious teachings. A manifestation of such hostility would be at war with our national tradition as embodied in the First Amendment's guaranty of the free exercise of religion. For the First Amendment rests upon the premise that both religion and government can best work to achieve their lofty aims if each is left free from the other within its respective sphere. Or, as we said in the Everson case, the First Amendment has erected a wall between Church and State which must be kept high and impregnable.

This statement is as applicable here as it was in *McCollum*. The practice challenged here, we submit, is in the long run harmful rather than beneficial to religion in general and to prayer in particular.

The stated purpose of the Board of Regents in formulating the challenged prayer and in urging its collective recitation daily in the public schools is to inculcate in the children an appreciation of the moral and spiritual values

shared by most Americans. But it is unreal to expect that an appreciation of moral and spiritual values can be communicated to our children by the rote recitation in the classroom of the prayer recommended by the Regents or of any other formalized prayer. Whatever is good and meaningful in prayer must inevitably be lost by its mechanical repetition in an atmosphere devoid of the religious spirit which only the home, church and synagogue can provide.

The prayer here under consideration is ordained not by religious authority but by public officials. It was formulated by a state agency, the Board of Regents, and imposed on the pupils by the respondent local school board. A similar effort to achieve a common denominator in religion—the proposal that schools teach the "common core" of all religions—has been aptly condemned by the American Council on Education in the following terms (American Council on Education, "The Relation of Religion to Public Education," p. 15 (1947)):

> The notion of a common core suggests a watering-down of the several faiths to the point where common essentials appear. This might easily lead to a new sect—a public school sect—which would take its place alongside the existing faiths and compete with them. The great religious bodies in America hold their respective faiths too seriously to admit of such a procedure on the part of the public schools.

Conclusion

Since the adoption of the First Amendment, the United States has escaped much of the bitter religious conflict and sectarian strife which have riven other parts of the world and driven men to violence and bloodshed. That good fortune has been due in no small part to two of the truly great contributions the American people have made to

western civilization: the concept of the separation of church and state and the free public school system. The first, by protecting religion against the intrusion of civil authority and by making it impossible for the state to become a battleground for sectarian preference and favor, has preserved both our political freedom and our religious freedom. The second, by providing for the education of our children on terms of complete equality and without cognizance of their differences in religious beliefs or disbeliefs, has been the cornerstone of our American democracy. The intrusion of religion upon the public school system, as we have shown in this brief, both threatens the separation of church and state and challenges the traditional integrity of the public schools. That intrusion, if permitted and sanctioned as sought by respondents, will greatly endanger the institutions which have preserved religious and political freedom in the United States and which have prevented religious warfare in this nation. We believe that continued preservation of the victory which the Fathers of the Constitution won for political and religious liberty requires reversal of the judgment herein.

Respectfully submitted,

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March, 1962

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IN THE

Supreme Court of the United States

October Term, 1961

No. 468

STEVEN I. ENGEL, *et al.*,
Petitioners,

v.

WILLIAM J. VITALE, JR., *et al.*,
Respondents.

On Writ of Certiorari to the Court of Appeals of the State of New York

BRIEF OF THE AMERICAN ETHICAL UNION AS *AMICUS CURIAE*

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The Interest of the American Ethical Union

This brief is submitted on behalf of the American Ethical Union pursuant to leave granted by this Court.

The American Ethical Union is a federation of Ethical Culture Societies and Groups in the United States, which, collectively, constitute a liberal religious fellowship known as the "Ethical Movement" or the "Ethical Culture Movement." There are twenty-eight Societies and Groups in

eleven states and the District of Columbia. Eight of these are located in New York State.

One of the parent petitioners in this case is a member of an Ethical Culture Society (R. 12). A fundamental tenet of the Ethical religion is the freedom of each individual to determine for himself whether or not to relate his religious aspirations to the existence of a Supreme Being.

> "Whether one does or does not believe in God, prayer or immortality, is one's own affair. Membership in an Ethical Society is not conditioned on acceptance or rejection of any one answer to such question. In the Ethical Movement the good life and the rights and duties of human beings are looked upon as stemming from man's relation to man in the family of mankind."
>
> (*Do You Know the Ethical Movement?*, pamphlet published by the American Ethical Union, 2 West 64th Street, New York 23, N. Y., p. 3.)

Recitation of the Regents' Prayer in a public school is thus a religious practice which is incompatible with the tenets of Ethical Culture.

ARGUMENT

The Regents' Prayer constitutes governmental preference for theism in violation of the First and Fourteenth Amendments.

The parties, and other *amici*, have fully covered in their briefs the history and case law relating to the Establishment clause of the First Amendment, and the basic principles demonstrating why the Regents' Prayer contravenes that clause. We will therefore not burden this Court by traversing the same ground, but will confine ourselves to placing before the Court considerations related to the effect of the decision below on adherents of a non-theistic religion, such as Ethical Culture.

Ethical Culture is one of those "religions in this country which do not teach what would generally be considered a belief in the existence of God." *Torcaso* v. *Watkins*, 367 U. S. 488 at 495 n. 11. This Court, in *Torcaso*, noted among other such religions Buddhism, Confucianism, Taoism and Secular Humanism.

In the brief *amicus curiae* presented by the American Ethical Union to this Court in *Torcaso* there was set forth an exposition of the characteristics and history of the Ethical Culture religion and its historic roots in the humanism and non-theism of the 18th and 19th centuries. There is no need to reiterate these facts, or the fact that Ethical Culture is a religion, as specifically recognized in *Torcaso*. [See also, *Washington Ethical Society* v. *District of Columbia*, 249 F. 2d 127 (D. C. Cir. 1957).]

While Ethical Culture is one of the "secularist" religions deriving in large part from the thinking of Franklin,

Paine, Jefferson, Emerson, Thoreau, Kant and others, some of the other non-theistic religions mentioned by the Court in *Torcaso* have different characteristics and different philosophic bases. Children of followers of those movements, however, like Ethical Culturists, are necessarily divided from children of followers of theistic religions by the Regents' Prayer. In addition, of course, there are the indeterminate number of children of parents who do not belong to any organized religion, and who may or may not accept the concept of prayer or of a Supreme Being. According to the *Statistical Abstract of the United States for 1961* (at p. 44), over one-third (37%) of the population was not affiliated with an organized religion as of 1959. While this figure does not of course show the proportion of persons in the United States who do not subscribe to the doctrines of the theistic religions, the statistics nevertheless suggest that this group is not insubstantial.

Ethical Culture neither categorically denies nor dogmatically affirms the existence of a Supreme Being. The Ethical Culture Movement includes members whose personal faith includes a Supreme Being, and those whose personal faith does not.

Ethical Culture believes, in the words of its founder, Felix Adler, that "It is the moral element contained in it that alone gives value and dignity to any religion." (Adler, *Creed and Deed*, 1886, p. 163.)

Appeal to the grace or benevolence of a Supreme Being is inconsistent with Ethical Culture, which holds that:

> "Religion, for all the various definitions that have been given of it, must surely mean the devotion of man to the highest ideal that he can conceive. And that ideal is a community of spirits in which the latent moral

potentialities of men shall have been elicited by their reciprocal endeavors to cultivate the best in their fellow men. What ultimate reality is we do not know; but we have the faith that expresses itself in the human world as the power which inspires in man moral purpose.

"Thus the 'God' that we love is not the figure on the great white throne, but the perfect pattern, envisioned by faith, of humanity as it should be, purged of the evil elements which retard its progress toward 'the knowledge, love and practice of the right.'"

(Muzzey, *Ethics as a Religion*, 1951, p. 95.)

The Ethical Culture Societies conduct services, and maintain religious schools for children which meet regularly on Sunday mornings. The Leaders of the Societies perform the functions of ministers, officiating at marriages and funerals and counselling members on moral and ethical problems. But the outward forms of worship characteristic of most theistic religion are rejected by Ethical Culture. As was stated by Felix Adler in the early days of the Movement:

"We propose to entirely exclude prayer and every form of ritual. Thus shall we avoid even the appearance of interfering with those to whom prayer and ritual, as a mode of expressing religious sentiment, are dear. And on the other hand we shall be just to those who have ceased to regard them as satisfactory and dispensed with them in their own persons."

(Address of May 15, 1876, quoted in "*Ideals at Work*," 1962, published by the American Ethical Union, 2 West 64th St., New York 23, N. Y., p. 1.)

Prayer never forms any part of the services conducted by an Ethical Culture Society. Nor is there ever any

organized appeal to a Supreme Being. Rather than teaching its followers to appeal to a personal God, Ethical Culture believes that "the appeal to conscience has ever been the lever that raised mankind to a higher plane of religion." (Adler, *Creed and Deed*, *op. cit. supra* at p. 164.)

Insofar as Ethical Culturists in the State of New York are concerned (and there are a substantial number of them), when the Regents' Prayer is recited in the classroom, state power is being exercised to subordinate their beliefs and religious practices to beliefs and religious practices approved by other sects. In direct opposition to the doctrine of the *Torcaso* case, the state is aiding "those religions based on a belief in the existence of God as against those religions founded on different beliefs." (*Torcaso* v. *Watkins*, *supra*, at 495.) This is so regardless of whether or not children of this or any other "non-conforming" religion are excused from participation in the religious ceremony which the state is conducting.

Recitation of this prayer under the aegis of state authority inevitably, by virtue of its official character, prefers certain religions over others. It is also an act of preference for the principle of religious observance over that of non-observance. The prayer is thus an "establishment of religion" in the literal sense of those words.

It is because practices like the Regents' Prayer do inevitably reflect official approval of some religious beliefs and official disapproval of other religious beliefs and of non-belief that the First Amendment forbids any "establishment of religion" and proscribes anything which makes religious observance a function of government.

The Regents' Prayer can be considered "non-sectarian" only in the sense that it is not directly adapted from the

ritual of any particular religious sect. That in no way diminishes its character as a prayer to a Supreme Being, or as a religious exercise of the state. The State of New York thus makes "public business of religious worship or instruction" in violation of the basic tenets of the Establishment clause (Mr. Justice Jackson, dissenting in *Everson v. Board of Education*, 330 U. S. 1, at 261).

The crux of the evil of officially sanctioned religious ceremony is that it is of necessity discriminatory and divisive. The action here under review has set a community at odds over a religious issue—precisely what the guaranty of religious freedom of the First Amendment was designed to prevent. This action of the state has imposed on the nonconforming school children a burden of dissociating themselves from official practice and has thus caused divisions in the school community along religious lines. The fact that the prayer is recited immediately after the Pledge of Allegiance to the Flag exacerbates these cleavages, particularly since it tends to suggest to the minds of the children that non-conformists are also unpatriotic. We believe that one of the aims of the First Amendment was to prevent such confusion of civil and religious values.

The action of the State of New York results in official distinctions among school children on religious grounds. It adversely affects adherents of Ethical Culture and all others who, for one reason or another, cannot conscientiously accept the State of New York's religious command. It offends against all members of the body politic, of whatever religious persuasion, by injecting religious controversy into the area of civil affairs.

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No. 468

In the Matter of the Application

of

STEVEN I. ENGEL, DANIEL LICHTENSTEIN, MONROE LERNER, LENORE LYONS and LAWRENCE ROTH,

Petitioners,

against

WILLIAM J. VITALE, Jr., PHILIP J. FREED, MARY HARTE, ANNE BIRCH and RICHARD SAUNDERS, constituting the Board of Education of Union Free School District Number Nine, New Hyde Park, New York,

Respondents,

directing them to discontinue a certain school practice

and

HENRY HOLLENBERG, ROSE LEVINE, MARTIN ABRAMS, HELEN SWANSON, WALTER F. GIBB, JANE EHLEN, RALPH B. WEBB, VIRGINIA ZIMMERMAN, VIRGINIA DAVIS, VIOLET S. COX, EVELYN KOSTER, IRENE O'ROURKE, ROSEMARIE PETELENZ, DANIEL J. REEHIL, THOMAS DELANEY and EDWARD L. MacFARLANE,

Intervenors-Respondents.

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Intervenors-Respondents

MOTION OF STATES ATTORNEYS GENERAL FOR LEAVE TO FILE BRIEF AMICI CURIAE

The undersigned, Attorney General of Nevada, on his own behalf, on behalf of the several states attorneys general whose names appear in this brief, and on behalf of

other states attorneys general who may at a later date, and before the decision in this case is rendered, move the Court to have their names added hereto, respectfully moves this Honorable Court, pursuant to the rules of this Court, for an order authorizing the late filing of the within brief upon the following grounds:

1. That knowledge that this case was before the Court did not come to the attention of the states attorneys general until a very late date and only recently have the respective attorneys general had an opportunity to read briefs that have been filed herein.

2. That this case is one of vital importance to the welfare of our Nation and to the preservation of its spiritual and moral heritage.

3. That although this brief supports the position of the respondents and intervenors-respondents, it does not raise additional points and authorities justifying any response by petitioners or amici curiae supporting petitioners' position.

ROGER D. FOLEY
Attorney General of Nevada

Supreme Court of the United States

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BRIEF OF STATES ATTORNEYS GENERAL AS AMICI CURIAE

Statement of Interest and Argument

History makes it clear that the architects of this Republic were men of deep religious faith. Our founding fathers,

together with the great and God-fearing leaders of the last century and a half, would be profoundly shocked were they to have been told in their day that in this year of our Lord, One Thousand Nine Hundred and Sixty-two, a voluntary nondenominational acknowledgment of a Supreme Being and a petition for His blessings, recited by American children in their classrooms, is being seriously attacked as a violation of the Constitution of the United States!

As the attorneys general of our sovereign states, we recognize and defend the right of every man to believe in God or not believe as he chooses, and should he profess such a faith, as nearly all Americans do, to worship God as he desires. Nevertheless, we firmly believe that as a Nation, America must remain true to her religious heritage and tradition. Our children must continue to have every opportunity to gain an appreciation of this heritage and tradition, not only at home and in the church, but also in public activities, including public schools and other governmental functions.

The basis of our national belief in the supremacy of the individual and the subservience of the state is a religious concept, not just a political or majority point of view. Those men who influenced the formation of our government, who authored the Declaration of Independence and the Constitution, and, in particular, those great leaders so often quoted in the briefs before the Court in this case, believed and taught that man is a creature of Almighty God and has an eternal destiny; that the dignity of the individual, his right to liberty and self-government, are God-given and inalienable.

The New York "Regents' Prayer" reads as follows:

Almighty God, we acknowledge our dependence upon Thee, and we beg Thy blessings upon us, our parents, our teachers and our Country.

If the "Regents' Prayer" cannot be said in the public schools without violating the First and Fourteenth Amendments of the Constitution of the United States, then what about the Pledge of Allegiance to the American Flag, wherein God's name is used, recited in schools as well as during other governmental activities? What of public prayer in the Congress, in our State Legislatures? What of the President's inauguration and oath of office, and similar oaths of lesser officials? What of the oaths used in our courts? What of the motto, "In God we trust", on our coins, and the Great Seal of the United States with its references to God? Yes, what of the very words employed in the opening of each day's session of this Supreme Court, "God save the United States, God save this Honorable Court"? What of the expressions in the constitutions of forty-nine of our fifty states making mention of a Supreme Being and expressing gratitude to God for all our blessings?

There is nothing in the First Amendment that limits the prohibition against "an establishment of religion" to the field of education.

If the voluntary recitation of this nondenominational prayer recited in public schools is unconstitutional, then it should logically follow that public acknowledgment of and prayer to Almighty God must be banished from all governmental functions.

The vast majority of our countrymen hold fast to the belief that America became a great nation and will remain

freedom's stronghold only if she remains true to her religious heritage and tradition. Our beloved country as we know it cannot survive as a Godless nation.

In 1892, in "Holy Trinity Church v. United States," 143 U.S. 457, this Court said:

> But beyond all these matters no purpose of action against religion can be imputed to any legislation, state or national, because this is a religious people. This is historically true. From the discovery of this continent to the present hour, there is single voice making this affirmation. (p. 465)

In 1951, in "Zorach v. Clauson," 343 U.S. 306, this Court said, "We are a religious people whose Constitution presupposes a Supreme Being."

Please God we shall ever remain a religious people.

Conclusion

For the reasons above set forth, we fully support the position, and adopt the briefs, of respondents and intervenors-respondents. We urge this Honorable Court to affirm the decision of the Court of Appeals of the State of New York.

Respectfully submitted,

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And each Attorney General heretofore listed, Amici Curiae.